CAPE OF GOOD HOPE.

[Parliament. House] 8—

REPORT

OF THE

SELECT COMMITTEE

ON THE

RESIDENT MAGISTRATE'S COURT AMENDMENT BILL.

Printed by Order of the House of Assembly.

NOVEMBER, 1909.

134

CAPE TOWN:
CAPE TIMES LIMITED, GOVERNMENT PRINTERS.
1909.

ORDERS OF THE HOUSE.

27th October, 1909.

ORDERED: That the *Resident Magistrate's Court Amendment Bill* be referred to a Select Committee with power to take evidence and call for Papers.

28th October, 1909.

ORDERED: That the Attorney-General, Messrs. W. P. Schreiner, Upington, H. S. van Zyl, Wessels, D. M. Brown, Cronwright-Schreiner, Macintosh, Oosthuisen, Louw, Michau and C. J. Krige, be members of the Committee.

REPORT

OF THE

SELECT COMMITTEE appointed by Orders of the House of Assembly, dated the 27th and 28th October, 1909, on the *Resident Magistrate's Court Amendment Bill;* the Committee to have power to take evidence and call for papers and to consist of the ATTORNEY-GENERAL, Messrs. W. P. SCHREINER. UPINGTON, H. S. VAN ZYL, WESSELS, D. M. BROWN, CORNWRIGHT-SCHREINER. MACINTOSH, OOSTHUISEN, LOUW, MICHAU. and C. J. KRIGE.

1. Your Committee have taken voluminous evidence on the Bill referred to them, with the result that they find themselves at this late stage of the Session unable to do more than recommend the provision of increased jurisdiction for Magistrates' Courts from £20 to £50 in illiquid cases.

They therefore recommend the following amendments in the Bill referred to them, viz :—

To omit Clauses One to Thirty-four and the Schedule of the Bill and substitute the following Clauses in lieu thereof:

(1) From and after the taking effect of this Act section eight, sub-section (2). of Act No. 20 of 1856, as amended by Act No. 43 of 1885, shall be read as though the word "fifty" were substituted for the word "twenty" therein.

(2) Section Thirty-four of Act No. 20 of 1856 is hereby amended by the substitution of the word "fifty" for the words "forty" or "twenty" whenever the same appeared therein.

(3) This Act shall be called "The Resident Magistrate's Court Amendment Act, 1909."

2. The evidence taken by your Committee has disclosed the desirability of amending the Magistrate's Court Act in several directions, but they are of opinion that comprehensive treatment of this subject should be delayed until a future date.

HENRY BURTON,
Chairman.

Committee Rooms,
House of Assembly,
26th November, 1909.

VERSLAG

VAN HET

GEKOZEN COMITE aangesteld door Besluit van de Wetgevende Vergadering van 27 en 28 October, op het *Resident Magistraat's Hof Amendement Wetsontwerp*, het Comité de macht te hebben getuigenis in te winnen en om papieren te vragen, en te bestaan uit de PROCUREUR-GENERAAL, de heeren W. P. SCHREINER, UPINGTON, H. S. VAN ZIJL, WESSELS, D. M. BROWN, CRONWRIGHT-SCHREINER, MACINTOSH, OOSTHUISEN, LOUW, MICHAU en C. J. KRIGE.

Uw Comité heeft zeer veel getuigenis ingewonnen omtrent het wetsontwerp naar hem verwezen met het gevolg dat daar het nu het einde van de sessie is het onmogelijk voor hem is meer te doen dan de voorziening voor vermeerderde jurisdictie van Magistraat's Hoven van £20 tot £50 in illiquide zaken aan te bevelen. Hij beveelt dus de volgende amendementen in het wetsontwerp aan dat naar hem verwezen werd, nl. :—

Clausulen Een tot Vier-en-dertig te schrappen en de volgende Clausulen in plaats daarvan te stellen :—

1. Van en na het van kracht worden van deze Wet wordt sub-sectie (2) van sectie acht van Wet No. 20 van 1856, zooals geamendeerd door Wet No. 43 van 1885, gelezen alsof het woord "twintig" daarin vervangen was door het woord "vijftig."

(2) Sectie vier-en-dertig van Wet No. 20 van 1856, wordt mits deze geamendeerd door de vervanging van de woorden "veertig" of "twintig" door het woord "vijftig."

Deze wet wordt genoemd "De Resident Magistraat's Hof Amendement Wet, 1909."

De getuigenis door uw Comité ingewonnen heeft de wenschelijkheid getoond van de Magistraats Hof Wet in meer dan een opzicht te amendeeren, maar uw Comité is van gevoelen dat een veelomvattend behandeling van dit onderwerp tot een latere datum behoort uitgesteld te worden.

H. BURTON,
Voorzitter.

Comité Kamer,
Wetgevende Vergadering,
26 November, 1909.

PROCEEDINGS OF COMMITTEE.

PROCEEDINGS OF THE SELECT COMMITTEE, appointed by Orders of the House of Assembly, dated the 27th and 28th October, 1909, on the *Resident Magistrate's Court Amendment Bill;* the Committee to have power to take evidence and call for Papers, and to consist of the ATTORNEY-GENERAL, Messrs. W. P. SCHREINER, UPINGTON, H. S. VAN ZYL, WESSELS, D. M. BROWN, CRONWRIGHT SCHREINER, MACINTOSH, OOSTHUISEN, LOUW, MICHAU, and C. J. KRIGE.

Friday, 29th October, 1909.

PRESENT:

Mr. Upington.	Mr. Macintosh.
Mr. Wessels.	Mr. Michau.
Mr. D. M. Brown.	Mr. C. J. Krige.

Clerk read Orders of the House, dated the 27th and 28th October, 1909, appointing the Committee.

Resolved: That the Attorney-General be Chairman.

In the absence of the Chairman,

Resolved: That Mr. C. J. Krige take the Chair.

The Committee deliberated, and adjourned until Monday, at 10 a.m.

Monday, 1st November, 1909.

PRESENT:

THE ATTORNEY-GENERAL (Chairman).

W. P. Schreiner.	Mr. Macintosh.
Mr. Upington.	Mr. Oosthuisen.
Mr. Wessels.	Mr. Louw.
Mr. D. M. Brown.	Mr. Michau.
Mr. Cronwright Schreiner.	Mr. C. J. Krige.

Mr. William Templer Buissinné, President of the Incorporated Law Society, was examined, and put in a written statement of his personal views on section twenty-four of the Bill. [Appendix A.]

The Committee deliberated, and adjourned until to-morrow, at 10.30 a.m.

Tuesday, 2nd November, 1909.

PRESENT :

THE ATTORNEY-GENERAL (Chairman).

Mr. H S. van Zyl.	Mr. Oosthuisen.
Mr. D. M. Brown.	Mr. Louw.
Mr. Cronwright Schreiner.	Mr. Michau.
Mr. Macintosh.	Mr. C. J. Krige.

Mr. William Templer Buissinné, President of the Incorporated Law Society, was further examined.

The Committee deliberated, and adjourned until Thursday, at 11 a.m.

Thursday, 4th November, 1909.

PRESENT :

THE ATTORNEY-GENERAL (Chairman).

Mr. Upington.	Mr. Macintosh.
Mr. H. S. van Zyl.	Mr. Oosthuisen.
Mr. Wessels.	Mr. Louw.
Mr. D. M. Brown.	Mr. Michau.
Mr. Cronwright Schreiner.	Mr. C. J. Krige.

The Chairman laid upon the Table schedule of amendments proposed by the Committee of Legal Practitioners for the Amendment of Act No. 20 of 1856 and Reform of Magistrates' Court Procedure. [Appendix B.]

Mr. William George Fairbridge, Vice-President of the Incorporated Law Society, was examined.

The Committee deliberated, and adjourned until to-morrow, at 11 a.m.

Friday, 5th November, 1909.

PRESENT :

THE ATTORNEY-GENERAL (Chairman).

Mr. Upington.	Mr. Oosthuisen.
Mr. H. S. van Zyl.	Mr. Louw.
Mr. Wessels.	Mr. Michau.
Mr. D. M. Brown.	Mr. C. J. Krige.
Mr. Cronwright Schreiner.	

In the absence of the Chairman,

Resolved : That Mr. Michau take the Chair.

The Acting Chairman read and laid upon the Table a letter, dated the 4th instant, from Mr. W. T. Buissinné, regarding Practitioners sharing fees with unqualified persons. [Appendix C.]

Mr. William George Fairbridge, Vice-President of the Incorporated Law Society, was further examined.

During the examination of the witness the Chairman entered the room, and Mr. Michau vacated the Chair.

The Committee deliberated, and adjourned until Monday, at 11 a.m.

Monday, 8th November, 1909.

PRESENT :

THE ATTORNEY-GENERAL (Chairman).

Mr. H. S. van Zyl.	Mr. Oosthuisen.
Mr. D. M. Brown.	Mr. Louw.
Mr. Cronwright Schreiner.	Mr. Michau.

Mr. William George Fairbridge, Vice-President of the Incorporated Law Society, was further examined.

During the examination of the witness the Chairman left the room and Mr. Michau took the Chair, the Chairman subsequently returning and Mr. Michau vacating the Chair.

Mr. William Bunting Shaw, Secretary of the Committee of Legal Practitioners for the Amendment of Act No. 20 of 1856, and Reform of Magistrate's Court Procedure, was examined.

The Committee deliberated, and adjourned until Wednesday, at 11 a.m.

Wednesday, 10th November, 1909.

PRESENT :

THE ATTORNEY-GENERAL (Chairman).

Mr. D. M. Brown.	Mr. Louw.
Mr. Cronwright Schreiner.	Mr. Michau.
Mr. Oosthuisen.	Mr. C. J. Krige.

Mr. William Bunting Shaw was further examined.

The Committee deliberated, and adjourned until to-morrow, at 10.30 a.m.

Thursday, 11th November, 1909.

PRESENT :

Mr. C. J. KRIGE (Acting Chairman).

Mr. H. S. van Zyl.	Mr. Macintosh.
Mr. D. M. Brown.	Mr. Oosthuisen.
Mr. Cronwright Schreiner.	Mr. Michau.

In the absence of the Chairman,

Resolved : That Mr. C. J. Krige take the Chair.

Mr. William Bunting Shaw was further examined.

Mr. Conrad Christian Silberbauer, Chairman of the Committee of Legal Practitioners for the Amendment of Act No. 20 of 1856, and Reform of Magistrate's Court Procedure, was examined.

The Committee deliberated, and adjourned until to-morrow at 10.30 a.m.

Friday, 12th November, 1909.

PRESENT :

Mr. C. J. KRIGE (Acting Chairman).

Mr. H. S. van Zyl.	Mr. Cronwright Schreiner.
Mr. D. M. Brown.	Mr. Oosthuizen.

In the absence of the Chairman,

Resolved : That Mr. C. J. Krige take the chair.

Mr. Conrad Christian Silberbauer was further examined.

During the examination of the witness the Acting Chairman left the room, and Mr. D. M. Brown took the chair.

Mr. George Blackstone Williams, Resident Magistrate, Cape Town, was examined.

During the examination of the witness the Acting Chairman returned, and Mr. D. M. Brown vacated the chair.

The Committee deliberated, and adjourned until to-morrow, at 10.30 a.m.

Monday, 15th November, 1909.

PRESENT :

The ATTORNEY-GENERAL (Chairman).

Mr. H. S. van Zyl.	Mr. Oosthuisen.
Mr. D. M. Brown.	Mr. Michau.
Mr. Cronwright Schreiner.	

In the absence of the Chairman,

Resolved : That Mr. Cronwright Schreiner take the Chair.

The Acting Chairman laid upon the Table copy of The Attorneys, Notaries and Conveyancers Consolidation Bill, 1906, referred to in Mr. Silberbauer's evidence.

Mr. George Blackstone Williams, Resident Magistrate, Cape Town, was further examined.

During the examination of the witness the Chairman entered the room, and Mr. Cronwright Schreiner vacated the Chair.

The Committee deliberated, and adjourned until to-morrow at 10.30 a.m.

Friday, 19th November, 1909.

PRESENT :

The ATTORNEY-GENERAL (Chairman).

Mr. Upington.	Mr. Oosthuisen.
Mr. H. S. van Zyl.	Mr. Louw.
Mr. Wessels.	Mr. Michau.
Mr. D. M. Brown.	Mr. C. J. Krige.

In the absence of the Chairman,

Resolved : That Mr. C. J. Krige take the chair.

Clerk read Orders of the House, dated the 15th and 17th instant, that the Committee, which had adjourned until Tuesday, the 16th instant, meet on Friday, the 19th instant, at 10.30 a.m.

Mr. George James Boyes, Resident Magistrate, Simonstown, was examined.

During the examination of the witness, the Chairman entered the room, and Mr. C. J. Krige vacated the chair.

The Committee deliberated, and adjourned until Monday, at 10.30 a.m.

Monday, 22nd November, 1909.

PRESENT :

Mr. C. J. KRIGE (Acting Chairman).

Mr. Upington.	Mr. Oosthuisen.
Mr. D. M. Brown.	Mr. Louw.

In the absence of the Chairman,

Resolved : That Mr. C. J. Krige take the chair.

Clerk laid upon the Table a letter, dated the 19th instant, from Mr. C. C. Silberbauer, transmitting a letter dated the 18th instant, signed by the remaining members of the Committee of Legal Practitioners for the Amendment of Act No. 20 of 1856 and Reform of Magistrates' Court Procedure, expressing themselves in accord with the evidence given before the Select Committee by Mr. C. C. Silberbauer and Mr. W. B. Shaw, together with a copy of reply thereto. [Appendix D.]

Resolved : That there be laid before the Committee the Reports received by the Attorney-General's Department from various Resident Magistrates on the Resident Magistrate's Court Amendment Bill.

The Committee deliberated, and adjourned until Wednesday, at 10.30 a.m.

Wednesday, 24th November, 1909.

PRESENT :

The ATTORNEY-GENERAL (Chairman).

Mr. W. P. Schreiner.	Mr. Cronwright Schreiner.
Mr. Upington,	Mr. Oosthuisen.
Mr. H. S. van Zyl.	Mr. Louw.
Mr. Wessels.	Mr. C. J. Krige.
Mr. D. M. Brown.	

In the absence of the Chairman,

Resolved : That Mr. Cronwright Schreiner take the chair.

Mr. Malcolm William Searle, K.C., was examined.

During the examination of the witness the Chairman entered the room, and Mr. Cronwright Schreiner vacated the chair.

The Chairman laid upon the Table a synopsis of reports received by the Attorney-General's Department from various Resident Magistrates on the Bill. [Appendix E.]

The Committee deliberated, and adjourned until Friday at 10.30 a.m.

Friday, 26th November, 1909.

PRESENT :

The ATTORNEY-GENERAL (Chairman).

Mr. Upington.	Mr. Oosthuisen.
Mr. H. S. van Zyl.	Mr. Louw.
Mr. Wessels.	Mr. Michau.
Mr. D. M. Brown.	Mr. C. J. Krige.
Mr. Cronwright Schreiner.	

Clerk submitted the manuscript of the evidence of Mr. Malcolm William Searle, K.C., given before the Committee on the 24th instant, in which he had made certain material alterations.

Resolved : That these alterations be approved.

The Chairman read and laid upon the Table a letter, dated the 24th instant, from Mr. M. W. Searle, K.C., on the subject of certain proposed amendments to the Bill. [Appendix F.]

The Chairman submitted a Draft Report, which was considered and adopted.

Resolved : That the Chairman report accordingly.

MINUTES OF EVIDENCE.

SELECT COMMITTEE ON RESIDENT MAGISTRATE'S COURT AMENDMENT BILL.

Monday, 1st November, 1909.

PRESENT:

THE ATTORNEY-GENERAL (Chairman).

Mr. W. P. Schreiner.	Mr. Macintosh.
Mr. Upington.	Mr. Oosthuisen.
Mr. Wessels.	Mr. Louw.
Mr. D. M. Brown.	Mr. Michau.
Mr. Cronwright Schreiner.	Mr. C. J. Krige.

Mr. William Templer Buissinné, examined.

Mr. W. T. Buissinné. Nov. 1, 1909

1. *Chairman.*] You are an attorney, practising in Cape Town, and member of the firm of Van Zyl & Buissinné?—Yes.

2. You are the President of the Incorporated Law Society?—I am.

3. Have you made yourself acquainted with this Bill?—Yes; I have gone through it. I understand there is a statement being circulated that this Bill was drafted by the Incorporated Law Society, and I wish to take this opportunity of saying that that is not so.

4. You say it has not been drawn by the Incorporated Law Society, nor at the suggestion of that Society?—Just so.

5. Was the Society aware of the fact that such a Bill was being prepared?—I believe so. I believe there was an interview between the committee of these gentlemen who are promoting the Bill and certain members of the Council of the Incorporated Law Society. I was not present.

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6. Do you mean members of the Law Society who were appointed as a committee, or simply an informal meeting?—I think they were appointed as a committee to discuss the matter.

7. Has the Council taken any corporate action in the matter?—The Council had a meeting on Saturday morning last, at which five members were present.

8. May I inquire whether you came to any conclusion in regard to the Bill. Did you decide to submit the views of the Council as a Council?—We dealt with the Bill as a whole. Two of the members, of whom I was one, were dead against section twenty-four, and I have made a written statement of my objection. Three of the members of the committee of the Council were reluctantly in favour of it, if I may put it in that way.

9. Two of you were strongly against it?—Yes, against section twenty-four.

10. And three out of your committee of five, you say, were reluctantly in favour of it?—I will put it in this way, that they were reluctantly prepared to pass it subject to certain conditions.

11. I would like the committee to be clear on the point of whether you are now going to give us an expression of your own individual opinion or an expression of the committee's opinion?—This is an expression of my own opinion.

12. Are we to have an opportunity of hearing the opinion of the committee?—Yes; Mr. Fairbridge is here, and he and I differ in our views. I have therefore embodied my views in a memorandum, which I will now read and put in. [Witness put in memorandum.]

13. Before we go into the details of that, you say you held this meeting at which five members of the Incorporated Law Society were present. Did you call a full meeting?—We called a full meeting of the Council.

14. And this is the result?—Yes.

15. How many members are there on the Council?—Nine.

16. And five of them attended this meeting?—Yes. The absent members were Messrs. Reid, David Tennant, Berrangé and W. Bisset. Of course it was rather an awkward time, being Saturday morning.

17. *Mr. W. P. Schreiner.*] Had you not had a meeting before?—I do not know what happened before, as I have been away ill, and have only just come back to the office.

18. *Chairman.*] In matters of this kind is it the ordinary procedure of the Incorporated Law Society to hold meetings of the Council and not full meetings of the Society?—We hold full meetings of the Council.

19. When matters of this kind crop up?—Yes.

20. You submit the result of the meeting of the Council, as far as you are unanimous, to this Select Committee as representing the views of the Council of the Society?—You may take it, of course, that the views of the Council of the Society are the views of the majority; but I felt so strongly on this matter that I told the members present at that meeting that I was going to put forward my own individual views, which were shared by another member of the Council who was present.

21. You have given an expression of your views with regard to section twenty-four. Have you anything to say with regard to other sections of the Bill?—Yes. There is sub-section (1) of section six; that is already provided for by section five of Act No. 43 of 1885.

22. In exactly the same manner?—Yes, extending the jurisdiction to £250. If it is intended to apply to foreign judgments, I think it is unwise—with due respect to the magistrates—to trust them with that jurisdiction.

23. *Mr. W. P. Schreiner.*] Even for a small amount?—Yes.

24. *Chairman.*] Why?—You get a foreign judgment in another Court, and you move for provisional sentence before a magistrate. It may be a somewhat peculiar case. It may be a foreign

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judgment or a judgment of another Court in another country—not necessarily an English judgment. I think it would be unwise to remove that jurisdiction from the Supreme Court to the Court of the Resident Magistrate.

25. To what extent are foreign judgments, other than judgments of the courts in the Empire, validated here?—I speak now, of course, subject to correction, but I suppose if you got a judgment in the Court in Berlin, and got that certified as a true judgment by the Ambassador at Berlin, you could possibly get provisional judgment in the Supreme Court here.

26. Against a man resident in the Cape Colony?—Resident within this jurisdiction, certainly.

27. You have no precedent for going as far as that?—No. As I say, I speak subject to correction.

28. As a matter of fact, is there any precedent for the Supreme Court recognizing, and has it recognized, the judgments of entirely foreign Courts?—I think so.

29. Have you any further remarks?—Then there is section ten. By this section 'movable property' and 'movables' include cash or its equivalent certificates of shares of companies. Of course heretofore, even under a writ of the Supreme Court, you have not been entitled to attach money without a special application to the Court after securing a return of *nulla bona* on your writ. By this clause it is contemplated that the Magistrate's Court writ should apply against cash and equivalent certificates of shares of companies, without any special application. I object to that.

30. You say in the Supreme Court you have to go through the process of having a special motion? Yes.

31. You have stated your objection to this. Can you extend it a little, and give us the grounds?—Yes. I do not think the magistrate should be entrusted with making an order for the attachment of cash. I think when there is cash in

dispute an application to the higher Court should be necessary.

32. In your opinion the attachment of cash on a judgment should not be within the jurisdiction of the magistrate at all?—No, it should not.

33. Neither that nor scrip?—Just so.

34. I notice this section is as wide as it can be. It includes in the "movables" under the Magistrates Court Act everything except absolutely immovable property?—Yes.

35. Everything is included barring immovable property?—Yes.

36. *Mr. W. P. Schreiner.*] It therefore includes a great deal which would not be included under a writ of the Supreme Court?—Yes. I have already pointed that out; in the Supreme Court you cannot attach cash or scrip except on special application after a return of *nulla bona*. Then with regard to section eleven, it appears to me that the object of this clause is to relieve the Messenger from all responsibility, as far as I can make out. He may, by virtue of this section, indiscriminately make an attachment without bothering to inquire to whom the things belong, so long as they are found on the defendant's farm.

37. *Chairman.*] You are not in favour of that?—No. The responsibility should remain at the risk of the plaintiff after an affidavit has been lodged, as heretofore.

38. At present is not the onus of issuing process on the Court in such cases as this? Has not the Court got to see to the issue of process?—The Court would issue process, but under the present system if the property was claimed by a third party he would make an affidavit, and the onus would be on the plaintiff to proceed or not. Apparently this amendment relieves the Messenger of all responsibility, and throws the burden of proof upon the claimant other than the parties to the suit.

39. *Mr. W. P. Schreiner.*] Are you not perhaps misapprehending that? Does it not amount to

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leaving the law as it stands at present with regard to the making of the claim? Then what it does do is this—and upon this I would like your opinion: it says that the person claiming must issue a summons within seven days, and if he does not do it the property is sold, and he has no right. I would like your opinion on the quick way in which a person having a right to property which is attached may be deprived of that right. The section does not say what remedy he has when the property has been sold?—The time given is altogether too short. I object to the section altogether.

40. *Chairman.*] There are twelve days allowed?—Yes; summons must be issued within seven days from the last day of the five days' notice.

41. In your opinion, is the present machinery under the Act of 1856 sufficient with regard to the procedure in interpleader suits?—Yes, I think it is sufficient. Moreover, I think it is preferable. Then with regard to section twelve, here again money may be attached under a writ. The power given is thus greater than that of the Supreme Court, which requires formal application and proof of notice to the defendant. Under this section the magistrate's warrant will be sufficient without hearing parties and without notice to any one.

42. As far as I can see, sections twelve, thirteen and fourteen seem to hang together?—Yes, they do. My point is that I may have money of yours in my possession, but I may have a good or prior claim, and the Supreme Court requires notice to be given, but here the magistrate can issue the warrant without notice or inquiry, and his jurisdiction is therefor far greater than that of the Supreme Court.

43. Which you think would be objectionable?—Most objectionable. The same remarks apply in regard to sections thirteen and fourteen. Then there is section fifteen. As that section stands, even if the plaintiff has released a debtor he may

re-arrest and again civilly imprison him. The words used are "... and even if he shall previously for any reason whatever have been discharged from such imprisonment." That section is clumsily drawn.

44. You think that would be an objectionable section?—Most objectionable. The policy of the higher Courts has been to do away with civil imprisonment, and a very good thing too, I consider.

45. You object to giving further facilities?—Yes, for locking up a man because he cannot pay his debts.

46. *Mr. Wessels.*] Suppose he can and does not pay?—If he can he will in nine cases out of ten, and if you can show he has plenty of means and will not pay you still have your remedy.

47. *Chairman.*] With the exception of that first statement you have put in on that clause twenty-four, does the rest of your evidence which you are giving represent the views of the majority of your Committee?—No. These views on the rest of the sections are my own views, because I want to be left free to give evidence on my objections to this Bill.

48. Let me understand the position clearly. Are we going to have before us evidence representing the views of the majority? Who will give us that?—The position is this. The impression left upon my mind by the meeting of the Council on Saturday morning was that on the section on which I have submitted my objections in writing the majority should have their say and the minority should have their say. On the other sections the witnesses appearing here should have a free hand.

49. *Mr. Macintosh.*] Does that mean that we get no evidence from the Law Society itself?—Except on section twenty-four.

50. *Chairman.*] On that you are divided?—Yes, but the opinion of the majority must bind the minority.

51. *Mr. Macintosh.*] Does it mean that the Law

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Society are not prepared to give evidence on this Bill?—I am now endeavouring to assist this Committee. I take it the Law Society, as a Society, have no strong objection to the Bill.

52. *Chairman.*] No strong objection?—No. I think Mr. Fairbridge will probably bear me out in that.

53. I thought it would be of great assistance to the Committee if we could get from some witness —you would have been the proper witness, being the President—a statement of the Law Society's corporate opinion upon this Bill, whether by majority or otherwise, after they had threshed it out amongst themselves?—Of course it has been a little unfortunate that I have been ill and away from the office. I suggested to the meeting the other morning that perhaps I had better not attend this Committee, but they thought I should come.

54. Is there any reasonable chance of our getting such a corporate opinion expressed by your Society during the sitting of this Committee?—I think it is quite possible, but it would take a long time to go through these sections as a corporate body.

55. This Bill will alter the Magistrate's Act in some vital respects. Is it not worth while the Council going through it?—Yes.

56. Will you go on to the next clause you wish to direct our attention to?—I dealt with section fifteen. We have dealt with section twenty-four, so I will now deal with section twenty-five. I do not think it is at all likely the Supreme Court will deal with the misconduct of law agents. This should be left to the Magistrate, in my opinion. Besides this, by an amendment which has been suggested certain duties are thrown upon the Attorney-General which he should not be asked to undertake. I refer to an amendment which appears in a list of proposed amendments to the Bill which have been suggested by the committee of Legal Practitioners for the Amendment of Act No.

20 of 1856 and Reform of Magistrates' Court Procedure. The amendment proposed by that committee to section twenty-five reads "To delete the last sentence and add 'The Resident Magistrate of the Court in which any agent shall be enrolled shall hold an inquiry into any charge of misconduct brought to his notice or preferred against such agent and shall secure the attendance of all witnesses in support of such charge or of any other witnesses whom the agent may desire to call on his behalf and shall take the evidence of such witnesses on oath and record the same. Upon the completion of the record of the evidence so adduced at such inquiry, the Magistrate shall forward such record to the Attorney-General who shall, if he be satisfied that a *prima facie* case of misconduct appear from the record, forward the record to the Registrar of the Supreme Court with the request that the case may be set down for hearing. The Registrar shall then set the case down for hearing and shall notify the Attorney-General and such agent of the day appointed for the hearing. Upon the day appointed for the hearing, the Court may after the record has been read, and after considering such further evidence as may have been tendered, and after Counsel for the Attorney-General and such agent respectively have been heard, make such order as it may think fit."

57. You have said nothing about section twenty, which amends the twenty-seventh section of the Principal Act, by inserting the words "and costs" after "such order." Have you considered that?—Yes; I have no objection to that. I cannot say that I have any detailed objections to section thirty. I consider it should be struck out altogether. In regard to section thirty-one, the words used are "unable to attend Court," which means that a man may not attend because he is too busy, or because of some idle excuse. Any man could say, "I am not going to Court; I am unable to attend the Court," and then that section could be put into force.

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58. The chief use of the section is to make use of interrogatories where people are inside the jurisdiction, whereas prior to that it has only been in regard to people outside the jurisdiction?—Yes.

59. You object to that?—Yes; I think it should be made more clear, because any reason may be assigned, frivolous or otherwise.

60. You think in certain circumstances interrogatories should be allowed?—In certain instances, where good and satisfactory reason can be shown. I think those are all the observations I wish to make.

61. *Mr. W. P. Schreiner.*] With regard to clause seven, do you not think it is rather a strong thing to give the magistrate the power practically to refer the case to any one else within his discretion, without the consent of parties? Of course you are aware such powers are vested in the higher Courts, but is it not rather a strong thing to give that power to every magistrate to appoint a referee to determine the issue, when by the law at present the magistrate is the official appointed to determine certain matters?—Under that section the referee reports, does he not?

62. The referee reports to the Court, and then the magistrate may or may not accept or reject, wholly or in part, with or without amending the report?—In considering that question I was looking at it from the point of view of accounts.

63. There I am personally entirely with you—where there are complicated matters of account. I think it is very reasonable to refer a matter like that to a referee. But do you not think it is giving the magistrates strong power to decide whether a cause requires prolonged examination of documents or scientific, technical or local investigation, and to refer it to a referee without the consent of the parties?—I think it ought to be limited to questions of account or questions in which expert knowledge was required, as for example a case regarding machinery.

64. I suppose that would be covered by the term "scientific"?—Yes.

65. I am referring to the matter of a cause requiring prolonged examination of documents or local investigation?—I think it would be unwise to give such power in a case of that kind.

66. *Chairman.*] It seems to me to come to this, that a magistrate may refer pretty well any case to a referee?—Yes, but I understand there is a proposed amendment to that in the list of amendments I have referred to.

67. *Mr. W. P. Schreiner.*] Even so, does it not tend to increase the costs when the magistrate is rather busy, and he refers the decision of the issue to some other party? Will it not make litigation much more costly?—Most certainly. The whole of this Act is going to make litigation in the Resident Magistrates' Courts more costly.

68. *Mr. Wessels.*] You are not touching the tariff?—No, but there are other sections which will increase the cost of litigation in the Magistrates' Courts.

69. *Mr. W. P. Schreiner.*] As between clauses six and eight, if you will take them together, you see sub-section (2) of section six raises the jurisdiction from £20 to £50?—Yes.

70. Then section eight says that "£50" shall be inserted where "£40" or "£20" occur in section thirty-four of the principal Act?—Yes.

71. I want to draw your attention to the fact that if clause thirty-four of the principal Act stands, a man bringing an action in the Supreme Court and claiming £500 damages from his neighbour for defamation would only get Magistrate's Court costs allowed if he did not recover more than £50 from the judgment of the Supreme Court?—That appears to be so.

72. Having regard to your experience in higher Court actions, is this amendment a sound one?—No; I should think it was not.

73. Is it sound to force all those damages cases in which people value their damages very highly into the Magistrates' Courts unless they are quite sure of getting £50 or upwards from the higher Court?—Certainly not.

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74. It has often happened in your experience, has it not, that plaintiffs have brought actions for heavy damages and the Court, although only allowing small damages, has allowed the costs on the Supreme Court scale?—Yes.

75. But I suggest that if Parliament raises the limit to £50 then in such cases the Court is not likely to allow the higher scale of costs?—I think that is quite likely.

76. I suggest to you that the eighth section should be omitted?—Yes, leave it out altogether.

77. Then I would suggest to you that "£50" in sub-section (2) of section six should be made "£40" in lieu of "£20," and put it on the same footing as rent cases?—Yes. I approve of your suggestions. I did think that the jurisdiction of the Magistrates' Court should be raised, but I think £50 is rather higher than I should have suggested. I think £40 would be quite enough.

78. And you agree that clause eight ought to be omitted?—Yes.

79. You said something about clause eleven. Would not a man be left very remediless if his property was sold after a short notice like this and nothing further was provided in the measure?—That is my objection—that his property could be sold after the lapse of those periods and he would have no remedy.

80. Have you any idea of a remedy you would like to suggest?—I should like to see the law remain in force as at present, by the person whose property is attempted to be attached making an affidavit and throwing the burden upon the plaintiff.

81. In short, you do not think section eleven is necessary?—Just so.

82. In clause twelve there is provision that the movable property of a debtor in the hands of third parties may be attached under a warrant upon the application of the judgment creditor, supported by affidavit?—Yes.

83. Do you think that if this is allowed it should

only be allowed after notice to the person in whose possession the property is, so that he shall have some opportunity of showing why the property should not be attached?—Yes. As I have said, the power is really greater than that of the Supreme Court, which requires proof of notice to the defendant; here it is to be done without notice to any one.

84. Is that sound?—It is indeed unsound. I might have a prior claim to money of yours which is in my hands. I think this provision is really dangerous.

85. *Mr. Wessels.*] Would it meet your objection if notice was given to the third party?—Not in the case of money. I say in a case of money the higher Court ought to have jurisdiction; it is not a jurisdiction which I would lightly throw into the hands of the magistrates.

86. *Chairman.*] Have you considered section thirteen in connection with section twelve?—Yes, and more or less the same remarks apply.

87. Section thirteen says, ". . . Any party objecting to the attachment in satisfaction of the judgment creditor's claim of the attached movable property shall, within ten days after the date of such attachment, notify the said Messenger, in writing, of such objection and the ground thereof . . ." So that apparently after they have taken the property away the onus is on him to show the Court that it should not have been attached?—Yes, because the rest of the section reads, ". . . The Messenger shall then without delay notify the judgment creditor of such objection, and the judgment creditor shall, within five days after receipt of such notice, consent or refuse to release the attached movable property. Failing such release, the party objecting shall issue process as provided in the Principal Act as amended by sections eleven and twelve of this Act."

88. *Mr. W. P. Schreiner.*] He must take proceedings on an *ex parte* application?—Yes.

89. Do you not think it is rather dangerous in

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clauses sixteen and seventeen to alter the present principle with regard to the payment of costs?—I do not think so; I think that is a reasonable provision.

90. Do you not think the law is well conceived now in leaving out those costs?—I do not think so.

91. Where a person is very poor, is it not sometimes likely to lead to the same sort of thing as was exposed in "Little Dorritt" in England—a man getting so overloaded with costs and charges that he can never get out of prison at all? Is there no danger of that?—As I said in my evidence, I am against civil imprisonment.

92. You are against civil imprisonment of every one who cannot pay?—Yes, not the man who can pay, but the man who cannot pay and is sent to gaol to satisfy the spite of the creditor. Still, I do think that if a judgment is given against that man the costs should be given against him.

93. In the judgment?—Yes.

94. But these are the costs of obtaining and executing the decree?—I think those should also follow.

95. It will add considerably to the burden resting on the civilly imprisoned person?—I quite see that, but my argument is that if he is civilly imprisoned he is justly civilly imprisoned, and if that is so he should bear the costs.

96. A man cannot be imprisoned now unless he has some means?—Just so. The policy of the law is against civil imprisonment.

97. And therefore he may fairly be made responsible for the costs.—Yes. We must presume he is justly civilly imprisoned, and in that case I see no objection to the costs being given.

98. Is not that liable to stimulate people to take proceedings for civil imprisonment?—In the lower Courts the costs will not amount to much, and I trust in the higher Courts my profession would not merely press a matter for the purpose of getting costs.

99. Of course this procedure only affects the lower Courts?—Yes.

100. What happens in the higher Court where costs of a similar nature occur?—If my memory serves me, those costs are allowed.

101. And you think the same principle should apply in the lower Courts?—Yes.

102. *Chairman.*] Are all the costs lumped on to the debt in the Superior Courts?—I am again speaking subject to correction, but I think so. Of course I have not been concerned in a civil imprisonment case in the Supreme Court for the last twenty years.

103. *Mr. W. P. Schreiner.*] There is a change in section nineteen, which says that the affidavit which is provided in the twenty-sixth section of the Principal Act may be sworn and executed before any Justice of the Peace?—Yes.

104. I want to know if you agree with that. According to section twenty-six of the Principal Act everything in connection with such an affidavit has to be done before the Resident Magistrate?—Yes.

105. Now it says that the affidavit and security bonds may be executed before any Justice of the Peace. Why is that?—I agree with you. I had not considered the point particularly before, but since you draw my attention to the fact, I strongly object to its being sworn before the Justice of the Peace.

106. It should be taken before the magistrate?—Yes. Besides, you will impose duties on the Justice of the Peace for which he will receive no remuneration, and which may land him in an action for damages.

107. And then the Justice of the Peace might be in the very office of the plaintiff?—Yes.

108. *Chairman.*] Is not the position of the creditor in the Magistrates' Courts not made easier than in the Superior Courts? It seems to me the process here is made very much easier?—Yes.

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109. *Mr. W. P. Schreiner.*] I would put section twenty-two to you. That is rather strong, is it not? Suppose there is some place—there may not be many places—where there are no attorneys practising for the public interest; is it not rather strong to say there shall be no agent enrolled?—I did not consider that, because I did not think it affected us very much, but I have no objection to the admission of an agent where there are not two attorneys practising. I look at this section as being a sop to the attorneys.

110. Section twenty-three says, "It shall be an offence for any person to act falsely as a duly qualified practitioner . . ." and later on it says, "Falsely acting as a duly qualified practitioner shall mean falsely pretending to be an advocate, attorney, agent as aforesaid, taking or using any name title, addition or description whereby it may be inferred . . ." etc. I want to ask you, as President of the Incorporated Law Society, whether you know of any case where any person has committed this sort of offence?—Never.

111. Why are we asked to legislate on an offence which has never been committed by any one?—I have no idea why that was put in.

112. *Mr. Wessels.*] Do you not know of cases which have been brought to the notice of the Law Society where agents have misrepresented themselves in this respect?—I cannot remember any.

113. *Chairman.*] At present are the Secretaries of Divisional Councils and of Municipalities allowed to appear in the Magistrates' Courts to represent their bodies?—Yes. By rule of Court No. 448 any Secretary of a Municipality or Divisional Council and any officer of the Government may appear in the Magistrates' Courts in connection with civil suits. I tell you what this section may be intended to cover—a man admitted and enrolled in Simon's Town coming to Cape Town to practise in the Magistrate's Court in Cape Town.

114. Could such a man do that?—I do not know if it has ever been done.

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115. With regard to section twenty-four, you say you do not at all approve of encouraging qualified practitioners to enter into partnership with agents of lower Courts?—I am certainly against it.

116. This only affects the Magistrates' Courts and not the higher Courts?—Yes.

117. Supposing a young attorney goes to a country district, and an agent is established there, what is the substantial objection, if they are practising opposite each other, to their also entering into partnership as regards their Magistrate's Court practice?—I have the same objection to that as I would have to a partnership between a barrister and an attorney in Supreme Court practice.

118. Why? I am taking Magistrate's Court practice as we know it in a country district There is no parallel to the barrister and attorney practising here, because the attorney and agent are doing exactly the same in regard to their functions before the Magistrate's Court, and why should they not for that purpose enter into an arrangement if they choose? I just want your opinion; I am not expressing mine?—I perhaps hold peculiar views on this subject. My idea has always been to raise the qualification of my profession. I have known numbers of agents whom I personally would have no objection to going into partnership with—well-educated, clever gentlemen—but we are not legislating for the individual case. I say it would tend not to raise the agent to the attorney's status, but towards lowering the status of the attorney to that of the agent, who is an unqualified man with no legal training, and who, on paying his £10 at the Court of the Resident Magistrate, can be admitted to practise.

119. He could only do that with considerable limitations. They cannot be admitted in future in large numbers? Is that not so?—Yes.

120. I am taking the case from the point of view of the young attorney and his future. Is it not better for a young attorney to go to a country

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district where there is a long-established law-agent and enter into some definite, recognised statutory agreement with him to go into partnership for a Magistrate's Court business, rather than for the young attorney not to have that opportunity ?—I think not. I am quite sympathetic with the young attorney, but I would very much prefer that he entered that man's office as a paid assistant than that he went into partnership with him.

121. Is not that a little lowering for the status of the attorney ?—I do not think it is, because I think if you allow the partnership arrangement it is the thin edge of the wedge. Immediately you admit a partnership between barrister and attorney you amalgamate the professions, and the same if you admit a partnership between attorney and agent. I know the Bar has a very great objection to such amalgamation and I object on the same grounds to amalgamating the attorney with the man who has not the same legal qualification and has not spent years and money in acquiring a knowledge of the law.

122. *Mr. Wessels.*] In the Magistrate's Court they stand upon the same level ?—I think the judges of the Supreme Court would object most strongly to it. I think, if I looked it up, I could find strong expressions of opinion from the Bench on such a partnership.

123. *Mr. W. P. Schreiner.*] As an attorney, do you think it is desirable that advocates should be in partnership ?—No ; I do not.

124. It is not prohibited in this Bill. You think there should be that limitation ?—Yes, there should be.

125. You are not aware the Bar has been consulted at all on that subject ?—I am not aware.

126. With regard to clause thirty, you are not engaged much in criminal practice ?—Very little.

127. But I think you are aware that many accused persons are sent to trial before the same magistrate who has worked up the case ?—Yes.

128. The power of remitting leads to many a man receiving the decision of his case, and the sentence upon him, from the person who has worked up his case from the first as prosecutor ?—Yes.

129. Do you think that is healthy ?—It is most unjust to the man, and I think most unjust to the magistrate. I think I expressed my opinion in the Press many years ago on that very subject.

130. Do you think we should endeavour to limit the remitting of cases to the same men as have sat on them in the first instance ?—Yes.

131. *Chairman.*] At present, of course, the remits must all go back to the magistrates who originally took the cases ?—Yes.

132. So this state of affairs occurs in every case ?—Yes.

133. So that your objection would involve the appointment of a public prosecutor in every case ?—Yes.

134. The chief constable is the prosecutor now, but very often he is, unfortunately, not competent ?—Besides it does not work in practice. I have been in a Resident Magistrate's Court where the chief constable has taken up the prosecution, and the magistrate has stopped him in asking what I considered to be perfectly valid questions.

135. See what the solution means. The solution means that there must be somebody in the shape of a public prosecutor appointed at every Magistrate's Court. Now what class of official have you in your mind, if you have thought it out at all ? There was once the clerk of the peace ?—That is the man.

136. Did that system work well when it was in force ?—It was before my time. I believe it did work well, but I think it was condemned on the score of expense. There is absolutely no doubt that there ought to be somebody in the Magistrate's Court to conduct the prosecutions.

137. *Mr. Wessels.*] But you do not do away with the objection that the man who holds the pre-

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liminary examination tries the case again?—The objection is not so strong if the prosecutor has a free hand, apart from the magistrate.

138. Is not the objection the fact that the man trying the case has very often had to work up the prosecution?—Yes.

139. The solution, from your point of view, is the appointment of a public prosecutor?—Yes.

140. *Mr. W. P. Schreiner.*] And the improvement of the status of the chief constable, so that he is more of a qualified man with legal training?—Yes.

141. You are aware that the chief constables are now many of them men of higher status and education than they used to be?—I know they are in some districts.

142. It is never just that a man who has zealously worked up a case against an accused should have that case remitted to him for him to determine against that man?—No. No matter however straight a man's moral character is it is unjust. He has to work up the case and force it home, and therefore it is unfair both to him and the accused that he should have to decide the case.

143. But you do not think a man ought to be able to dictate to the Attorney-General what should be done about his case?—No. I think this section should be deleted.

144. Do you think section twenty-five makes sufficient provision for the manner in which charges of misconduct are to be brought against practitioners?—It is not likely the Supreme Court will deal with the misconduct of law-agents. This must, in my opinion, be left in the hands of the magistrate, besides which the amendment which I have quoted throws a duty on the Attorney-General which he should not be asked to undertake. That is my opinion. In the Bill as originally drafted there was no machinery, and then apparently this suggested amendment provided machinery which threw the duty upon the Attorney-General.

145. It is asking too much of the Attorney-General?—Yes.

146. Do you think it is far better it should be done by the Incorporated Law Society?—I do not think the Incorporated Law Society should deal with law-agents at all. We have refused to do so in the past.

147. You have your precedent, and know how to deal fairly with unprofessional conduct, and do you not think it would be as well to let your Society investigate such matters?—It would throw a burden upon the Incorporated Law Society which would be almost intolerable, I am afraid.

148. The alternative almost is to have an incorporated law-agents' society?—Yes.

149. *Chairman.*] You do not think the control of the magistrates over the law-agents should be taken away?—No.

150. *Mr. W. P. Schreiner.*] You do not think that, in addition to the control of the magistrate, there should be some one to present before the magistrate complaints which are made against the conduct of law-agents, just as in the case of the Supreme Court there is some one to complain against the conduct of an attorney?—I think there should be, but I do not think it should be thrown on the Incorporated Law Society, nor on the Attorney-General, but on the man we were talking about just now—the public prosecutor.

151. Must we wait till we get him?—Let it be put upon the magistrate to make inquiry, as he has control over them. The magistrate can no longer keep order in his Court if you deprive him of jurisdiction over the agents practising before him.

152. But you would think the Supreme Court should have a concurrent jurisdiction over the law-agent as well as the magistrate?—Yes, provided you do not ask the Incorporated Law Society to bring him before the Court.

153. Because you might have a case in which it was rather invidious to have the magistrate take up a matter against a law-agent?—Yes, but I do not think it is likely the Supreme Court would deal with such a case.

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154. If it had jurisdiction conferred upon it, it would?—Yes.

155. You have no other practical suggestion as to how the thing should be dealt with?—I looked into the matter a little while ago, and came to the conclusion that the magistrate has full power in all these cases. As a matter of fact, the magistrate does not deal with the law-agents, and sometimes reports to the Attorney-General, or to the Incorporated Law Society; and our reply always is that we are an Incorporated Law Society of the attorneys practising in this country, and cannot deal with the misconduct of law-agents. The magistrate has full jurisdiction, and could deal with these matters, but does not. That, of course, is the weakness of the magistrate.

156. You have no suggestion as to how it could be strengthened?—If I were a magistrate I think I could strengthen it.

Tuesday, 2nd November, 1909.

PRESENT:

THE ATTORNEY-GENERAL (Chairman).

Mr. H. S. van Zyl.	Mr. Oosthuisen.
Mr. D. M. Brown.	Mr. Louw.
Mr. Cronwright-Schreiner.	Mr. Michau.
Mr. Macintosh.	Mr. C. J. Krige.

Mr. William Templer Buissinné, further examined.

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157. *Mr. Cronwright-Schreiner.*] In the case of places like De Aar, where I happen to live, people come to such places and contract debts, especially at boarding-houses, and then they go away and their address is unknown, and they cannot be got at. Do you not think that that ought to be met in some way?—Does not the same difficulty arise in every case where you cannot find your debtor? Take this case. "A" telegraphs to me from

Durban :—" Debtor flitted. Assume he is going to England by the mail steamer. Cannot give you his address. Will you do all in your power to find him ? "

158. The people to whom I refer are non-residents ; they are there for three days and then go away, and the only thing to do, as you know, would be to telegraph down to the Supreme Court —a very expensive course—and then you would not know where to serve a writ ?—That difficulty may always arise, and does frequently arise, and we have to employ a detective frequently to find a man's address.

159. Do you not think we should give the Magistrate some power to stop such a man if he is found trying to get off like that, because it is a deliberate thing every time ?—My objection to clause 10 is that under it you propose to give the Magistrate power to attach funds even in the hands of a banker. In the Supreme Court we cannot do that. If there is money in the hands of a banker and we wish to attach it, we must make special application to the Court for leave to attach. I do not think it is wise to give that power without a special order.

160. We could not sue such a man on the spot at De Aar ; we would have to give him 48 hours' notice. Surely there should be some remedy in a case like that ?—Your remedy is to ascertain where the man has booked for and to communicate with the port or place to which he has booked. There is a provision whereby you can telegraph your affidavit and your warrant.

161. Suppose the man makes a debt of £2 10s., he is not worth following ; it is no use doing anything unless you can get something on the spot ?—What could you do on the spot ? What do you propose doing on the spot ?

162. That is what I ask you ?—Your Act does not provide for doing anything on the spot unless he has property there.

163. You could not even take that man's luggage?

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—No ; he might be travelling with my luggage, for instance.

164. Could you not give the Magistrate power to stop what he has got on the spot right away?—Hardship might arise. Suppose I travelled with a valet, and he had my luggage and was told to leave De Aar with my luggage. I may be waiting at the port, and if you attach that luggage summarily it would be a great hardship on me.

165. If you could afford a valet it would not be such a great hardship?—It would be a great hardship to be deprived of one's wearing apparel at a moment's notice.

166. Would you be in favour of giving the Magistrate power to issue a writ of attachment temporarily?—Yes, I do not think I should object to that, provided it was not money.

167. Barring money or scrip, you would be in favour of that?—Yes.

168. Would you be in favour of law agents being admitted to practise in the Magistrates' Courts in the Transkeian Territories?—I would be in favour of that wherever there are not two attorneys practising.

169. On the same terms as in the Colony?—Yes.

170. *Chairman.*] Wherever there are not two?—Yes.

171. You would admit the law agent where there was only one attorney?—Yes.

172. *Mr. H. S. van Zyl.*] You think it advisable to have one admitted in a place where there is only one attorney?—Yes.

173. Even more so than where there is no attorney?—Yes.

174. *Mr. D. M. Brown.*] Have you had a large experience of the working of the Magistrates' Court Act of 1856?—Not a very large experience, but I am one of the examiners for the practical examination, and we examine candidates on the Magistrates' Court practice and the Magistrates' Court Act.

175. So that your experience is more theoretical

than practical?—Yes; but we have a Magistrates' Court branch in our office.

176. With regard to clause 15, what is the difference between this clause and the present Act dealing with the action of the Magistrate where he has power to suspend the writ?—Being a lawyer. I do not like to speak without having the Magistrates' Court Act before me; but I noted my objection yesterday, which was this, that even if the defendant should have previously been discharged, he can be re-arrested under this clause.

177. It says, "It shall be lawful for a Court of Resident Magistrate, upon cause being shown, to grant a warrant for the further civil imprisonment . . ." That means another warrant?—Yes, "even if he shall previously, for any reason whatever"—it does not matter what the reason is—"have been discharged from such imprisonment." That is an innovation.

178. The point is this: what is the difference between what is proposed here and the present power of the Magistrate to suspend the writ?—The difference is that even if the debtor has previously been discharged he can now be re-imprisoned.

179. I have never known a Magistrate discharge a writ, and I did not know he had the power to do so; I have only known him to suspend a writ?—I am glad to say I do not know who is responsible for the drafting of this Bill, because it is very badly drafted.

180. What is the difference between the discharge and the suspension of a writ in practice?—At present you cannot re-arrest if you have discharged the debtor from imprisonment; under this Bill you can re-arrest if the writ has been executed and discharged.

181. Did you ever know a debtor to be discharged?—Yes.

182. With regard to clause 24, are you aware of the fact that there are a large number of the partnerships referred to in this clause existing

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at the present time in the country ?—No, I am not aware of it. If I were aware of it I should bring it to the notice of the Incorporated Law Society, and if you would mention a case to me I would bring it to the notice of the Society—that is, where an attorney was sharing attorney's fees with a law agent.

183. That is not what I want to get at. My point is, you know that these partnerships exist between attorneys and agents ?—I know there are partnerships between attorneys as auctioneers and agents. I would like to know of a partnership where an attorney is sharing his fees with an agent.

184. Do you not know that there are partnerships between attorneys and agents at present ?—Not where fees are shared ; not *qua* attorney. If you will report such a partnership to me, I will see that it is brought to the notice of the Court.

185. You suggest the abolition of civil imprisonment ; you are not in favour of it ?—I am not favourable to it, and I suggest its abolition where the law is put in force to satisfy the spite of some creditor.

186. Is not that a matter that can be safely left to the Magistrate ?—I do not think sufficient care is always exercised. I have had a great experience of Magistrates, an experience probably exceeding yours.

187. *Chairman.*] Do you suggest that it happens frequently that Magistrates grant decrees of civil imprisonment in cases where the application is made simply to satisfy the spite of the creditors ?—No, I will not go so far as that. I say sufficient care is not exercised.

188. You mean sufficient care is not exercised to see that a debtor is not imprisoned unless he can pay ?—Yes.

189. *Mr. H. S. van Zyl.*] Do you say that the Magistrate does not exercise the same discretion as the Supreme Court, for instance ?—Yes. I do not mean for one moment to cast a slur on the Magistrate, but I say there is not sufficient care exercised.

190. *Mr. D. M. Brown.*] Is that from hearsay or practical experience? You could not cite any special cases?—I would not cite them. I am not going to cite cases with which I have been connected professionally to you or any one else.

191. *Mr. Michau.*] It is far easier to get a writ of civil imprisonment in a Magistrate's Court than elsewhere?—Yes.

192. *Chairman.*] I understood your sentiment yesterday to be that you certainly would favour a a modification of the existing rules with regard to civil imprisonment in the direction of not detaining anybody unless he had the means and was wilfully withholding payment of his debt?—Yes.

193. Is not that the principle which is practically applied by the Supreme Court every day?—Yes.

194. *Mr. H. S. van Zyl.*] Is not that principle applied generally in the Magistrates' Courts too, where a debtor has not the means to pay?—I think it is. but, there is also the other thing which has come before me, that not sufficient care has been exercised.

195. *Mr. D. M. Brown.*] Supposing the idea of abolishing civil imprisonment were adopted, what would you suggest in its place?—When a man cannot pay, and you have satisfied yourself that he cannot pay, then you must do what we all do now and forgive him. Let him go; write off your debt.

196. With regard to clause 30, that is a very drastic proposal, is it not? It leaves the choice of his trial to the accused, which is unreasonable?—Yes, quite.

197. Would you make any suggestion at all with regard to that? Would you allow a question to be put to him asking him to express an opinion as to whether he should be tried by the Magistrate or by a Judge and jury, and to give his reasons for his choice?—I know there is a great deal of sympathy with crime in South Africa—and everywhere else for that matter, I suppose—but my

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sympathy with the criminal does not extend that far.

198. Would you allow the question to be put to him to give reasons why he should be tried by jury?—I have no sympathy with the criminal. This 30th section is sympathy with the criminal.

199. He is not a criminal then; would you allow such a question to be put to the accused person?—No; it is quite an unnecessary section.

200. You are in favour, where a decree of civil imprisonment is granted, that that person be called upon to pay the costs?—Yes.

201. Would you not have a section leaving that to the discretion of the Court?—No. Since giving evidence yesterday I have looked up that point. In the Supreme Court on the 31st December, 1832, it was held that the plaintiff obtaining a decree of civil imprisonment against a debtor was not entitled to the costs thereof. That was the case of Valentyn *vs.* Olivier (3 Menzies, 145). But no case can be found where this judgment has since been brought to the notice of the Court. On the other hand there have been several cases of costs for obtaining civil imprisonment. For instance, Hope *vs.* Brunette, decided in 1867; Sutherland *vs.* Bird, 1847 (3 Menzies, 155); Bates *vs.* Hutton, decided in 1875, not reported; Van Santen *vs.* Hopkins (3 Juta, 1881); and Eitzen & Co. *vs.* Van Laun (Buchanan 1874, p. 75); in all of which the costs of the motion were added to the debt.

202. You spoke strongly yesterday on the point of the admission of law agents to practise in Magistrates' Courts. Do you suggest any method by which they could be admitted as attorneys if necessary?—Only by going through the course all our men have to go through. My idea has been to raise the status of my profession, and if the Chairman would allow me I would like to state a personal instance. I do not like to give personal instances, but perhaps the Committee will bear with me when I say that, in what I am about to state, I was actuated by the idea of raising my

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profession. My lad was always destined for my office as an attorney. After he passed matriculation at the S.A. College I sent him to Cambridge, where he took his B.A. Then he joined the Bar and came out here, and was admitted as an advocate of the Supreme Court of this Colony. A week after I had him disbarred, and the next day he was articled to me and served his articles in my office. That is the spirit which actuates me when I tell you that I want to raise my profession and not lower it.

203. That is perhaps an impracticable thing for other persons to do?—That is what I would like to see, and that is why I have no suggestion to offer you. What I said yesterday was that I wanted to raise the status of the profession and to raise the educational test, not up to the Bar perhaps, but as near as possible to that as I could get.

204. In fact, you want to make attorneys lawyers?—Lawyers and educated gentlemen at the same time.

205. *Mr. Cronwright-Schreiner.*] Recognising that a man should be qualified before being admitted as an attorney, the Law Agents' Society, through me, sent a deputation to meet the Incorporated Law Society, and offered that every law agent before he could be admitted should pass every law examination required of an attorney, and we also said, "Let him have seven years' of actual consecutive practice behind him," but the point we could not get over was that he must serve articles?—That I know nothing of.

206. *Mr. D. M. Brown.*] Are there any general improvements in the Bill which you could suggest?—Yes, I could suggest some improvements. Under section 31 apparently any reason will do for not attending the Court in person. A man may say, "I have married a wife," or "I have bought a span of oxen and am going to try them." The section reads, "Who are unable to attend Court in person." The Act should provide that before the procedure mentioned is put into force,

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there must be satisfactory proof to the Court that the person is unable to attend. And similarly in section 32 substantial proof should be offered to the Court that a person is unable to attend. Otherwise you may have the Magistrate, his clerk, the plaintiff's agent, and the defendant's agent all journeying to the limit of a district to take the evidence of a man who had bought a span of oxen and was going to try them. There is no provision in the Act that he has to give a satisfactory reason to the Court that he is not able to attend. In section 33 there is the same thing. The bare statement that a man is unable to attend the Court appears to be sufficient. Provision should be made that sufficient reason should be given to the satisfaction of the Court. I have dealt with the question of funds in the hands of a banker, which means that the definition with regard to "movable property" and "movables" in section 10 will have to be amended if my suggestion is to be adopted. With regard to section 7 I have also suggested, subject to the approval of this Committee, that the matter of the inquiry under that section should be limited to the question of account. I went through the Bill with the view of giving evidence on it, but not with the view of making amendments, but the amendments I have mentioned would appear on the face of it to be absolutely necessary.

207. *Mr. H. S. van Zyl.*] With regard to the Schedule, do you approve of the filing of pleadings ?—Yes.

208. Is it desirable to first bring the parties into Court before making the defendant file his pleadings ?—I think after issue of summons it would be better.

209. Would it not increase the costs if you first bring the parties into Court before filing ?—I think it would.

210. It would be better to demand a plea from the defendant after summons, or he can at once file a plea if he wants to do so ?—Yes.

211. That will do away with the necessity of first appearing in the Court?—Yes. What is contemplated here, I take it, is that a summons is issued and thereupon the defendant should file a plea in writing, which I think an advantage.

212. *Chairman.*] That plea may be a plea of the general issue?—Yes.

213. Are the proceedings in Magistrates' Courts not often unduly protracted on account of the plea of general issue?—I do not know; much depends upon the Magistrate.

214. Would it not be an advantage, in your opinion, to provide that the defendant should shortly and simply state what his defence is, and not just plead the general issue?—I do not think it would be advisable to do away with the general issue. There may, of course, be cases in which a special plea cannot be put in, and then the general issue can be pleaded.

215. With regard to the practice in the Native Territories, there a plea is filed as a rule?—I am sorry to say I cannot speak with confidence on the practice in the Transkeian Territories.

216. *Mr. Michau.*] I understand that a man travelling and contravening the Scab Act, or the Fencing Act, or the Game Law, and refusing to stop, cannot be tried for that contravention unless he is arrested. Do you not think that provision should be made for bringing a man back to the Court of the district in which the crime was committed without arresting him?—How would you provide for bringing him back?

217. Could you not do it by summons countersigned by the Magistrate of the district to which the man has gone?—I have no objection to that. I do not want a Magistrate's summons to run beyond his jurisdiction, but if you can get it countersigned by the other Magistrate I have no objection.

218. With regard to the new Rule of Court permitting Secretaries of Divisional Councils to conduct cases in Magistrates' Courts, is there anything inconsistent between that Rule and this Bill?

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Do you not think that that is a thing that should not be allowed in fairness to the profession?—I have already moved in this matter, as President of the Law Society, by representing the unfairness of Rule 448 to the Judges of the Supreme Court, and in my last address to the Incorporated Law Society I suggested that it was unfair to the practitioner that clerks to Divisional Councils, clerks to Municipalities, and in certain cases clerks in Government offices should be allowed to come into direct competition with the man who had qualified for his profession, paid his fees, and had been admitted to legal practice.

219. *Mr. Macintosh.*] Do you think it is unfair to the public?—I think it is fair to the public in that the public is composed of all sorts and conditions of men.

220. Do you think it is unfair to the public outside the legal profession?—No.

221. *Mr. Michau.*] Do you not think that provision should be made in this Bill that no person should be allowed to appear in a Magistrate's Court unless he has been admitted to practise?—Yes, but perhaps I am prejudiced in favour of that view by reason of the profession to which I belong. I should rather that that came from somebody else who is not connected with the profession. The Law Society will do all in its power to get that Rule 448 abrogated if possible.

222. *Chairman.*] You think that should be done away with?—Yes, I do not think it is fair to the man you ask to enrol and pay fees.

223. *Mr. H. S. van Zyl.*] A plaintiff can appear himself?—Yes.

224. A Council cannot appear itself, but only through its representative?—Yes, I see what it is based upon.

225. *Mr. D. M. Brown.*] Do you appreciate the fact that in the case of small amounts, such as income tax, Municipal rates, and Divisional Council rates, unless the present system were in force the person called upon would have costs to

pay, whereas under the present system there are no costs to pay?—Yes.

226. *Mr. C. J. Krige.*] Do you think it necessary to extend the jurisdiction of the Courts of Resident Magistrates?—I think it is necessary to increase the jurisdiction to £40.

227. Do you think it is necessary that an order of civil imprisonment given by one Magistrate should have effect if the party against whom the decree is granted has removed to another district?—Certainly, if countersigned by the second Magistrate; but that is not provided for in this Bill.

228. Do you approve of the new Clause 5 suggested by the Promoters of the Bill?—I approve of the principle in new Clause 5.

229. Clause 10 you object to?—Yes.

230. You only base your objection on the fact that the Supreme Court has not that power itself, and therefore it is an unwise power to give the Court of a Resident Magistrate?—Yes.

231. You do not think it would serve a good purpose?—I do not.

232. Do you not think that the machinery provided under the Magistrates' Court Act is sufficient to protect parties in the case of the attachment of cash or scrip?—No, I think it is a wise thing that in order to attach scrip or cash there should be a special application to the Supreme Court.

233. You have no actual experience of country practice under the Magistrates' Court Act?—No.

234. You do not know if difficulties do arise in this regard?—I have no doubt difficulties arise; they even arise in the Supreme Court.

235. *Mr. Oosthuizen.*] I understand you are in favour of the principle that only an agent or attorney should appear in Court and not the Secretary of a Council or anybody not a professional man?—That is my view.

236. You know that a person can now appear for himself?—Yes.

237. Are you opposed to that too?—No.

238. You would leave that?—Yes. I am not

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opposed to that, because it would be silly to be opposed to it. Every man has a right to defend himself.

239. And with regard to the section where the jurisdiction of the Magistrate is raised to £50, do you not think it could be raised to £100?—If it were raised to £100 I should want to know what good there would be in maintaining the superior Courts.

240. In other parts of South Africa the Magistrate's jurisdiction is higher, is it not?—I am not an expert on any law except that of the Colony of the Cape of Good Hope, and I do not pretend to know anything about any law except our own law.

241. *Mr. Louw.*] We were told that this Bill was introduced to cheapen litigation, and yesterday you said it was going to make litigation more expensive; is that your idea?—Yes, and I will show you why. Take section 32, dealing with the evidence of a person who is unable to attend Court in person. As I said in my evidence yesterday, I can only deal with the Bill as it stands printed, and if that section stands as printed it is going to lead to the cost of litigation being increased. I am a witness, for instance. I live on the border of a district, and I am told that my evidence is required. I say I am not able to attend. Then the whole machinery has to be put in force and the Court, with everything that pertains to the Court, including the agents, has to travel out to my farm to take my evidence. That will very materially increase the cost. That applies to sections 31, 32 and 33. Any man who says he cannot come to you, even if he lives beyond your district, you must go to him. That will increase the cost of cart hire and all that sort of thing. Then take section 26. The old Act stipulated that 7s. 6d. and 10s. 6d. should be the charges. Now the Judges shall by Rule of Court or Order fix and at their discretion allow a tariff of fees.

242. *Chairman.*] You construe that as meaning

an increased tariff of fees against the public?—Yes, if it does not mean that it means nothing.

243. You do not consider that as a move in the direction of reducing the fees?—No. I know my profession and the men who practise it, and I know the Magistrate's Court agent too, and he has evidently thought that 7s. 6d. and 10s. 6d. is too little and he wants something more. The old Act limited the fee of counsel to one guinea, but section 27 of this Act makes it £3 3s. You will see throughout that I am justified when I say that the passing of this Act is undoubtedly going to increase the cost of litigation.

244. *Mr. C. J. Krige.*] As a rule do you find the Supreme Court very strict in drawing up a tariff of fees for lawyers?—Yes, very strict; the tendency is to cheapen litigation.

245. *Mr. Louw.*] Are there any other points in the Bill where you can point out that litigation will be made dearer than it is at present besides those you have mentioned?—I think I am quite safe in saying generally that if this Bill passes as printed the costs will be greater than they were in the past.

246. We were informed that the object of the Bill was to cheapen litigation?—There may be differences of opinion on that point, but in my opinion the costs will not be diminished.

247. *Chairman.*] Do you still think that, in spite of the fact that the increased jurisdiction of the Magistrate's Court is likely to throw much litigation into that Court that now goes to the superior Courts?—If you increase the jurisdiction, then of course you cheapen the litigation so far as that increased jurisdiction is concerned. For instance, under this Bill you can take a claim for £40 into the Magistrate's Court and get Magistrate's Court costs, but prior to the passing of this Act—if it is passed—you had to take a claim for £40 to the Supreme Court, and there would be a material increase of the costs in that respect. That is where the gentleman who said

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he thought it would diminish the costs was right, because in such a case there would be a diminution of the costs owing to the increased jurisdiction of the Magistrate's Court. Where the jurisdiction is increased you will have less to pay in law costs.

248. *Mr. Louw.*] Yesterday I think you said you were opposed to increasing the Magistrate's jurisdiction to £50; you thought £40 quite high enough?—Yes; I said that because Mr. Schreiner drew my attention to the fact that the 8th section was slightly inconsistent with sub-section 2 of section 6, and asked me whether I would not suggest that section 8 be deleted and that sub-section 2 of section 6 be reduced from £50 to £40, and I said "Yes." I had not considered that point till Mr. Schreiner drew my attention to it.

249. In the Transvaal the Magisterial jurisdiction in the case of goods sold and delivered is £250, illiquid claims £100, and promissory notes £500; are we not a bit behind the times when we only give our Magistrates the very limited jurisdiction they have hitherto had and which they are still to get under this Bill when compared with the jurisdiction given in the Transvaal? It is a good many years back since jurisdiction was first given to Magistrates, and we have a better class of Magistrates nowadays; and there is always the right to appeal to the Supreme Court. So will you object to our raising the Magistrate's jurisdiction to the same as they have in the Transvaal?—Yes.

250. May I ask why?—Because you might as well do away then with the necessity for higher Courts altogether. There would be no necessity for a Supreme Court of the Colony of the Cape of Good Hope, with five Judges at Cape Town, three at Graham's Town and one at Kimberley, if you increased the jurisdiction of the Magistrate to what it is in the Transvaal.

251. *Mr. H. S. van Zyl.*] Do you not think before the jurisdiction is increased to anything like that extent, the qualifications of our Magistrates should

be increased?—Undoubtedly. Of course, as I said before, there are numbers of Magistrates in our service who are quite able to deal with a jurisdiction as high as that suggested, but I think as a rule it will be agreed that if the jurisdiction were to be increased to that extent special qualifications would be required.

252. *Chairman.*] Seeing that Assistant Resident Magistrates have the same powers as Magistrates, would not the effect be that any young Assistant Magistrate would have the same jurisdiction then?—Yes.

253. *Mr. C. J. Krige.*] What is the difference in principle between giving jurisdiction in a promissory note of £500 and £250?—What is the difference in principle between £40 and £10,000?

254. *Mr. Cronwright-Schreiner.*] Harking back to the man who commits a civil offence, we will say at a place like De Aar, would you be in favour of allowing that man to be served with a summons there?—If he were not domiciled there, and provided you could effect personal service?

255. Yes?—Certainly.

256. With regard to section 27, do I understand your argument to be that you would confine the advocate to the same fee as other practitioners in the lower Courts?—I have no objection to the advocate drawing £3 3s., but I merely put that in answer to a member of the Committee who asked me for instances of increased charges.

257. Do you not think that all people practising in the Court should be paid the same?—No, I do not, because I think if a man has special qualifications he should have a special fee.

258. Should not that be an arrangement between the client and the attorney?—No; I would say that a man with special qualifications, who has expended time, money, energy, and what not, in acquiring those qualifications, is entitled to a special fee.

259. In view of the enhanced efficiency of our Magistrates, surely their jurisdiction in certain

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matters might be increased ; it would cheapen litigation up-country enormously ?—I am in favour of slightly increased jurisdiction. Apparently I do not go far enough to suit you, but I am in favour of a slightly increased jurisdiction.

260. *Mr. H. S. van Zyl.*] With regard to the cheapening of litigation under this Bill, you say the tendency would be to make litigation rather more expensive. Do you not rather overlook one point ? Take a case being instituted in Calvinia for £30 damages, which has now to be heard in Cape Town before the Supreme Court. If that case could be heard in Calvinia would it not be cheapening its cost ?—Perhaps I did not convey my meaning well. What I mean to say is that this Bill is calculated to increase the cost in the Resident-Magistrate's Court ; I do not say it tends to increase the cost of litigation generally.

261. In so far as the Bill will enable cases to be heard locally which now have to be brought to Cape Town there will be a saving ?—Yes. I am taking the Bill as it stands now, and I say it is calculated to increase the cost of cases which are now tried under the Principal Act of 1856.

262. *Mr. Michau.*] With regard to section 26, it is proposed in the amendments to strike that section out and to substitute a new section ; what is your view in that respect ?—I prefer the present section. I prefer to leave it to the discretion of the Judges of the Supreme Court.

263. *Chairman.*] The clause providing for the increase of Magisterial jurisdiction provides that on liquid documents which are sufficient to found a claim for provisional sentence in the Supreme Court the Magistrate shall have jurisdiction not exceeding £250 ; and then in sub-section 3 it is provided that wherever there is a claim on a liquid document up to £250 the defendant can claim on any cause of action whatever up to the same amount. Is that not inconsistent with sub-section 2 ?—Under sub-section 3 of section 6, if defendant is sued on a promissory note of £250 he may set

up a contra claim of an equal amount, whether liquid or illiquid, which practically increases the Magistrate's illiquid jurisdiction to £250, and is thus contrary to the increase in sub-section 2 of section 6. Mr. W. T. Buissinné. — Nov. 2, 1909.

264. Do you consider that increase of the illiquid jurisdiction in this way upon a counter claim, where there is a liquid claim by the plaintiff, is a good and proper position ?—I do not think it is sound.

265. A Magistrate under this provision would have the right to try cases of damages up to £250 on a claim in re-convention ?—Yes.

266. Are you in favour of the 6th paragraph of the Schedule, providing that interest shall accrue until payment is made upon a judgment debt ?—Yes.

267. And with regard to section 7 of the Schedule, dealing with the right of appeal, do you consider it is necessary to extend the time in which notice of appeal may be given ?—Yes.

Thursday, 4th November, 1909.

PRESENT:

THE ATTORNEY-GENERAL (Chairman).

Mr. Upington.	Mr. Macintosh.
Mr. H. S. van Zyl.	Mr. Oosthuisen.
Mr. Wessels.	Mr. Louw.
Mr. D. M. Brown.	Mr. Michau.
Mr. Cronwright-Schreiner.	Mr. C. J. Krige.

Mr. William George Fairbridge, examined.

268. *Chairman.*] You are an attorney of the Supreme Court practising in Cape Town, and a partner in the firm of Fairbridge, Arderne & Lawton ?—Yes. Mr. W. G. Fairbridge. — Nov. 4, 1909.

269. You are also a member of the Council of the Incorporated Law Society ?—Yes, I am Vice-President.

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270. Have you had much experience yourself of Magistrate's Court practice?—Yes, I may say I have had a good deal of experience of Magistrate's Court practice. I do not go into the Magistrate's Court myself very often, but I am constantly consulted, and I keep in touch with that practice.

271. A branch of your business is devoted to that work?—Yes.

272. You were a member of the Committee of the Council which met to go into the matter of this Bill?—The Council itself considered the Bill.

273. You were present at the meeting of the Council?—I was present at all the meetings of the Council at which this Bill was considered.

274. Mr. Buissinné told us that in one important matter his views represented those of the minority of the Council; that was on clause 24?—Yes.

275. Before we go into the Bill generally, are you going to represent to the Committee now the views of the majority on that point?—Yes.

276. What are the views of the majority?—Mr. Buissinné stated the view he holds with regard to the status of the legal profession. I think none of us yield to him in regard to the view he holds in that respect, but we have to take matters as they exist, and we do not find that partnerships between attorneys and agents are illegal. We do not find that such partnerships are prohibited by law, and therefore we must take it that a partnership of that kind can exist. It has been held by the Supreme Court here, and I think also there is a reported case in the Transvaal to the same effect, that an attorney should not share his fees, as such, with an agent, but we do not see that we can raise any effective opposition to a partnership between an attorney and an agent in which they do not share what might be called strictly attorney's or notary's fees or conveyancing fees. Subject to that qualification we think that a partnership is not prohibited. Our view is that we do not favour those partnerships, but we do not see our way to object to what the law allows.

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277. Of course, the law allows other partnerships which the profession as a profession are strongly against. Does the law not allow a barrister and advocate and an attorney to go into partnership? Is there any legal prohibition to that?—I have always understood that the Court would set its face against that and prohibit it. I have always understood it is prohibited—I might almost say prohibited by the constitution of the Bar.

278. The Bar, of course, would oppose it strongly, but I was putting the question of legality, upon which you mainly rested your view as to partnerships between attorneys and agents. I suppose there is nothing in law against a partnership between advocates themselves?—I should not like to give an opinion on that, but I can say that although it might not be prohibited by law I think it would be prohibited by the Court.

279. You think the Court would interfere; could it interfere?—I think the Court could. I take it that the Court could be the judge of what the rules are which guide the Bar.

280. At all events, the view that the majority of the Council takes is that they cannot object to clause 24 because the law admits of a partnership between an attorney and an agent?—There are two reasons. The one is that under the Magistrate's Court Act the attorney practising in a Magistrate's Court practically becomes an agent; for all practical purposes he is taken to be an agent in the Magistrate's Court. The other reason is that there is nothing to object to an attorney going into partnership with some one who is not an attorney in other things. He might go into a cattle dealing or a mining venture; he might be a partner in various things which are outside his profession; and I never heard that that was discountenanced.

281. A partnership in a mining venture or in cattle dealing might be an isolated transaction; do you mean going into partnership as a regular business, as a regular speculation?—Yes, I never understood that that could be prohibited.

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282. There is a distinction between that class of partnership and partnership in professional business?—The business in a Magistrate's Court or general agency business is outside legal work proper—Supreme Court work. There is no difficulty in separating the two. You could separate the fees to a penny.

283. There is no difficulty in separating attorney's fees *qua* attorney's fees from the rest of the fees?—None at all.

284. With regard to the Bill generally, your Council has considered the Bill; are you now going to give, in dealing with the Bill generally, the views of the majority of your Council?—The particular point upon which there was divergence of opinion was section 24. Otherwise I take it that Mr. Buissinné and I were sent to give our opinions on matters as they occur to us.

285. Are we to take, as a Select Committee of the House, that you and Mr. Buissinné represent the views of the Incorporated Law Society or simply your own personal views?—We were sent here to represent the views of the Council, but we are not delegates; we are witnesses.

286. Are we to take it that you do represent their views?—I think I may say we represent their views. If any question arises as to any particular clause, I can perhaps deal with that a little more precisely and tell you how far it was actually discussed.

287. *Mr. Upington.*] Have either you or Mr. Buissinné any definite instructions to lay before this Committee particular criticisms other than those directed to clause 24?—Yes, we are instructed to appear here and to put before the Committee what I may call the general sense of the discussion that has taken place with regard to this Bill. Mr. Buissinné, on account of illness, was not present at any of those meetings except the last. I was present at all, and I think I am in a position to give you the sense of the Council.

288. *Chairman.*] I take it you have not come

here with a number of cut and dried resolutions or expressions of opinion from the Council?—No.

289. But, generally speaking, may we take it that you represent the views of the Council?—I think substantially.

290. It is very desirable we should have the views of the Council as a Council, otherwise we may have to seek another way of getting them; but I suppose, from what you say, we may fairly take it that you and Mr. Buissinné do represent the views of the Council, except on clause 24, where you differ from him?—Yes.

291. Will you then take the Bill in detail?—On clause five there is an amendment suggested. I understand that clause five in the list of amendments is intended to obviate the difficulty that occurs—more particularly in the Cape district, where the Magistracies are small—of a person against whom judgment has been obtained jumping over the boundary and thus entailing the necessity of proceedings being taken *de novo*. Anything that rectifies that will be useful, the Council thinks, but I do not think the amendment will serve the purpose. The first part of it seems to be unnecessary, where it says, "The jurisdiction of any Court of Resident Magistrate out of which a summons in any suit has been served shall not be ousted by reason only of the defendant having subsequent to the service of such summons removed beyond the boundaries of such Magisterial district and of his having ceased to reside or carry on or be employed in business in such district." I take it that the jurisdiction, once established by the service of summons, continues.

292. If you have once caught him with your summons, surely your suit is established?—Yes, therefore the first part of that amendment is unnecessary.

293. How will this affect civil imprisonments?—I do not see any procedure provided in the second part of that amendment as to how you would carry into effect a decree. The Council is in favour of the principle.

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294. Is not the first part of the amendment in view of civil imprisonment?—It does not say so. It says the jurisdiction of the Magistrate shall not be ousted in any case where summons has been served, and then it goes on to say, "but shall continue to exist until the full end and determination of the suit."

295. If a man were summoned in a district and went away, you could not proceed upon that summons; the civil imprisonment proceedings would have to begin again? Do you mean that the words, "but shall continue to exist until the full end and determination of the suit" are intended to enable a summons for civil imprisonment to be issued against that man?—I think the principle in the amending clause five a useful one.

296. What is the next point?—The next is clause six. In the first place, with regard to sub-section (2) the Council thinks it desirable to increase the jurisdiction in such cases. They do not insist on the sum of £50. There is no question of principle about it; £40 would suit our view. With regard to the rest of the clause, I think that sub-section (1) is unnecessary. I think the present jurisdiction is sufficient. I think particularly in the case of a foreign judgment, it is not a matter which should be left to a Magistrate's Court to act on such a judgment. The capacity of the person who certified I do not think should be left to a Magistrate; and moreover a foreign judgment in most cases would be for a considerable amount.

297. Do I take your answer to mean that you think that sub-section (1) is unnecessary, not in the sense that you do not think it desirable so far as increasing the Magistrate's jurisdiction is concerned, but that you think it undesirable in so far as it gives the Magistrate jurisdiction to the extent of £250 in a matter of foreign judgment?—I think it unnecessary to give Magistrates jurisdiction in the matter of foreign judgments at all. With regard to sub-section (3) of section six, I think the proviso to existing section five of Act 43 of 1885 meets

the case sufficiently with regard to claims and counter-claims.

298. You think sub-section (3) also unnecessary ?—Perhaps I am not very clear as to the exact meaning of sub-section (3).

299. As this clause stands, the jurisdiction of the Magistrate on liquid documents being increased to £250, the defendant, in any case in which he had a claim brought against him, say of £250, on a liquid document, would be able to bring in a counter-claim of damages based on any sort of suit for £250 ?—I think that would not be desirable.

300. It is quite clear ; if there were a liquid claim for £250, the defendant would be able to counter-claim in damages on any suit for £250. Do you think that it is desirable ?—No ; I think it is giving jurisdiction to the Magistrate's Court which that Court is not qualified to deal with. Take an obvious case. The procedure in a Magistrate's Court is very simple. There is no power of getting disclosure of documents, and in a great many cases I think the Magistrate's Court would not be able to do justice in cases of that nature. That is the principle which is already underlying the restriction of jurisdiction.

301. Is there any reason why he should have greater jurisdiction in re-convention than in convention ?—No.

302. You see no good reason why, because the liquid jurisdiction is increased, the illiquid jurisdiction should also be increased by a side wind in such cases ?—No.

303. You think that is bad ?—Yes ; I think the proviso to section five of Act 43 of 1885 meets the case.

304. *Mr. C. J. Krige.*] You say that there is no reason for this alteration. Assume that "A" has a claim against "B" for £250 on a promissory note. and "B" has a claim for £200 for goods sold and delivered against "A." Would it not be hard for "B" not to have the right to establish his claim against "A" in the Magistrate's Court ?

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What is the difference between suing on a liquid claim for goods sold and delivered and bringing up an illiquid claim in reconvention equivalent to the amount of the liquid claim sued on?—The principle seems to be laid down that there is a difference. I do not say that in the Magistrate's Court there is so much difference between liquid and illiquid claims, because there you do not sue for provisional sentence; but in the Supreme Court there would be considerable difference in procedure, whether you sued on a promissory note or on an illiquid claim. As a rule the action on a liquid document is settled by the production of the document. That is so in the majority of cases. And I suppose it was thought reasonable, where the signature was objected to, or anything of that kind, to leave it to the Magistrate. I think that is the principle. On the other hand, illiquid claims are of a peculiar nature, and the same principles do not apply by any means to such actions.

305. If this sub-section (3) were omitted, it would have the effect of barring the defendant from bringing in his counter-claim in the Magistrate's Court?—It is not very often that when a plaintiff has a claim against a defendant the defendant has opportunely a claim against the plaintiff. It happens sometimes, but not very often.

306. *Mr. D. M. Brown.*] Do you not think that for rents the jurisdiction of the Magistrate ought to be extended to £100 at least?—Is there not power already if there is a lease?

307. I mean where there is no lease, which is very often the case?—I think the law should be left as it is in that respect. People should put their contracts in writing. If people neglect to take that precaution they must put up with any inconvenience that arises.

308. Would you not raise the jurisdiction in regard to rents to £100 equally with goods sold and delivered?—I do not think the Council has considered that.

309. What is your own personal opinion ?—I do not know that I have any strong feeling one way or the other. When it was a clear case I think it would be reasonable. The mere right of recovery might be entrusted to the Magistrate's Court.

310. *Chairman.*] What is the next point ?—Clause seven. I agree with the principle of that clause. There would very often be cases of account which the Magistrate could not deal with conveniently, and there might be cases in which it might be necessary to get a report on some matter relating to machinery, or something of that kind. But probably if the provision were limited to accounts it would meet all the requirements of the public. Even if the power were given to refer matters requiring scientific, technical or local investigation to a referee, it would be more desirable that the man who made such investigation should come to Court and be examined as a witness. I do not think the Magistrate should just take his report.

311. *Mr. Michau.*] You agree on that point with Mr. Buissinné ?—Yes; and matters of account would be the only cases in which the clause would become operative, I think.

312. *Chairman.*] Do not Magistrates now, as a matter of fact, exercise the jurisdiction of referring matters of account to referees ? I have spoken to the Magistrate of Cape Town on the subject, and he says that he constantly refers matters of account —things involving figures and so forth—to accountants ?—Probably by consent.

313. *Mr. D. M. Brown.*] I had a case where there was a dispute about damage to crops, which was a very fair case to submit to assessment, and that was done by consent. Why should you limit such reference to accounts ? The case to which I have referred was one where damage was done to crops by cattle, and the Magistrate by consent remitted it to two farmers for assessment. There is no provision unless there is a clause of this kind in the Act for a thing of that kind without con-

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sent?—In that case the two people who went out as assessors could have been called as witnesses.

314. To have called witnesses would have meant very heavy costs, and by referring the case to nominees agreed to by both parties all those costs were saved. Each party nominated one assessor, and the Magistrate a third?—Before I came here I discussed the matter with Mr. Buissinné and mentioned the very point you have raised as an instance where it might be desirable for the Magistrate to have this power. I see no objection to it myself. I only say that in my opinion it would be almost entirely questions of account that would have to be dealt with in that way. If it is thought that there would be other cases, such as the kind you have mentioned, I see no objection to the clause standing as it is.

315. *Chairman.*] The clause as it is provides for that procedure being adopted in a case requiring "local investigation," and the section provides that the Magistrate may refer "the whole cause"?—I understood the words "the whole clause or" were to be struck out.

316. Your opinion is based on the hypothesis of that amendment being adopted?—Yes. I think in the case of accounts there should be that power, and I do not see any objection to power being given in those other cases, but I doubt if there is much necessity for it. If it is considered there is necessity for it, I see no objection to it.

317. *Mr. Upington.*] Have you considered it from this point of view, that our over-worked Magistrates would be only too ready to refer these matters to outside people, and the effect of this clause would certainly not be to cheapen litigation. This clause will give a Magistrate power to refer any revelant question involving any trouble to himself to investigate to a third party?—So far as expense is concerned, I daresay that what is cut off the top of the blanket will be sewn on at the bottom.

318. In any case there is the objection that I

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suggest to you that you may have matters continually referred to which are likely to give the Magistrate trouble?—In questions of account no doubt such matters will come up often and there will be that tendency on the part of the Magistrates. Most people shirk dealing with figures if they are not obliged to deal with them. I do not think there will be many other cases which will arise, and I do not see any objection to the principle of such isolated cases being dealt with in that way.

319. From your experience of practice in the Supreme Court, do you find that the Court has ever referred questions of account to an official referee without first ascertaining the views of both parties?—There have been various references, but I cannot say if that course was adopted by consent or not. There was a very big reference in the case of Colley *vs.* the Kalk Bay Municipality, in which there was a question of account, and also, if I recollect aright, questions relating to engineering were referred, but whether by consent or not I do not remember.

320. *Mr. Wessels.*] Do you not think the referee should submit himself to cross-examination? Do you not think, if his report is adverse to one or other party, that that party should have the right of cross-examining him?—I think that would be reasonable. It says that such report may be rejected or adopted wholly or partially by such Court with or without amendment. I do not see how the Court can deal effectively with the matter unless the referee is before it.

321. The Magistrate would be largely guided by the report; should not the party, therefore, to whom the report is adverse be entitled to submit the referee to cross-examination?—I think that right would almost follow. The referee has to come up with his report. He has got to report what facts have been established by his investigations. The word "established" there would also probably have to be modified, as the words "tried

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and" are proposed to be struck out. The section goes on to say that the referee shall also report. if required of him, the decision or decisions at which he has arrived upon such facts. An important objection may be taken to the report and the Court must have something to go on; and I take it that in justice to suitors there should be some right of examination of the referee. I do not see that there would be any additional expense, because the referee would have to be present at Court, in order to answer any questions asked him by the Magistrate.

322. *Chairman.*] Do you know of any case, in which the Supreme Court has referred a matter of account or a matter requiring technical knowledge to a referee, where the Court has not accepted the referee's report?—There was the case of the Imperial Cold Storage Company against the Distributing Syndicate, in which Mr. Hennessy was the referee. Mr. Hennessy made his reports on various points, and his report was challenged and he came before the Court. The Court did not allow the objection, but it heard the application.

323. When the report comes up it can be dealt with in argument, of course, but have you ever known of a case where a matter has been referred to a scientific man or to a figure man and the referee has afterwards been put into the witness box to be fired at by the opposing parties?—If it is intended to refer the matter practically to the final settlement of the referee I should not be in favour of the clause.

324. *Mr. Michau.*] If you look at the Schedule you will see from the terms of the appointment of the official referee that he has to report in writing; he does not have to go to Court at all?—That will have to be modified. The case is not going to be delegated for "trial, investigation and report." I would sum up my views by saying that if the matter is to be referred absolutely and finally to the referee without there being any power of parties to cross-examine him as to the reasons for his

decision, I am doubtful whether such powers as are proposed under clause seven should be given. I think it would be hardly reasonable.

325. *Chairman.*] You mentioned the case of the Cold Storage Company against the Distributing Syndicate. There the report of the referee was challenged and brought up on account of the basis he had taken for his calculations, on account of the construction he put on the agreement?—Yes, and in consequence of the way he worked his figures on that agreement.

326. The legal question as to how he construed the agreement was the main thing?—Yes.

327. Do you not construe this clause to mean that a Magistrate, on a question of how much a certain account should be, would say, "There is Mr. A., who is a good figure man; I will let him find out," and when Mr. A. reported, that would be final, except that the Magistrate, on looking through the report, might send it back to A. for re-consideration? Are you in favour of the referee having to come to Court and be fired at in the witness box?—The matter can be brought before the Supreme Court on affidavit and motion, if it is asserted that the referee worked on a certain basis, taking into account certain considerations and disregarding others. The Magistrate's Court has nothing of that power, except by asking the referee himself. You could not have any equivalent in the Magistrate's Court to a motion in the Supreme Court. The procedure is so limited in that respect that the only remedy a party would have would be by asking: "Did you take so-and-so into consideration?"

328. Do I understand you to say that if this provision for a reference means that the referee is not to be liable to examination and cross-examination by the representatives of the parties in Court you are not favourable to the clause?—I think it would be dangerous to give that power. On the question of expense I do not think it makes any difference.

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329. Not even to matters of account?—No, not even as to accounts.

330. *Mr. Upington.*] Is this the view of the Council or your own personal view?—The last point I have been dealing with was not considered by the Council.

331. So it is your own personal opinion?—Yes.

332. *Chairman.*] What is the next point?—Section eight, I think, should be omitted.

333. Why?—The reason is this. At the present time a man brings an action for libel, for instance. He considers he has been grossly libelled, and brings an action for £1,000. In such a case the Court very often thinks that the justice of the case will be met by giving him £50, or perhaps £40. If section 34 of the Principal Act is amended as suggested here, in such a case judgment would only carry Magistrate's Court costs, and I do not think that is what was intended. I do not think that would be reasonable. There are a large number of cases for damages in which the Court gives something over £20 because they think the action was properly brought in the Supreme Court. You have often heard the Court give judgment for £25 when £20 would probably have met the justice of the case, but the Court says the action was properly brought in the Supreme Court.

334. *Mr. Upington.*] But, in regard to that, the Court has given only £10 damages in a libel suit and Supreme Court costs?—Was that not in a case where the parties were in different divisions? I think I should leave section 34 of the Principal Act as it is. I think if a man brings an action in the Supreme Court and gets £50 damages he should be entitled to Supreme Court costs, which he will not get without a special order if section eight of the present Bill passes.

335. *Mr. D. M. Brown.*] I can remember a case where £20 damages was given and costs, where the parties did not live in different divisions?—But where a man gets damages for £50 in the Supreme Court he gets costs. He does not have

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to ask the Court for costs under section 34, which he would have to ask for if this clause eight were passed.

336. *Chairman.*] What is the next point?—The next is clause nine. I think to give an effective remedy it should go a little further. It does not say what will be the effect of getting the warrant endorsed in another district. I am not clear what will happen in that case.

337. *Mr. Upington.*] The effect of the endorsement will be that the writ or warrant will have effect in another district. It is to have "the like force and effect in every respect as if it had been issued originally out of the Court of the Resident Magistrate last endorsing same?"—Then the words might be added, "and execution thereof shall be carried out by the Magistrate of such last-named Court of Resident Magistrate," or words to that effect.

338. Does not that follow?—I merely make the suggestion. It may be sufficiently clear as it stands.

339. *Mr. Michau.*] Do you think it is clear from this clause that it would apply to a decree of civil imprisonment?—No; I think it is intended to apply to a writ of execution against property only.

340. *Mr. H. S. van Zyl.*] Does not the amended clause five provide for that?—No, I do not think it does. I do not see the effective remedy that amended clause five gives. I may be wrong, but I cannot see it. I know it is intended to apply to that, but I do not think it succeeds. I think clause 9 is intended to apply entirely to the execution of a warrant against property.

341. *Chairman.*] Do you consider it desirable to extend the principle of this clause nine to decrees of civil imprisonment?—I do.

342. *Mr. Upington.*] What is the existing difficulty? What is the particular inconvenience that this clause, in your opinion, aims at remedying?—I think if a man leaves one district in which he has been residing and where a judgment has been

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obtained against him and goes into another district, you would have to go to the Supreme Court to get a writ of civil imprisonment against him.

343. Do you think it is desirable that that should be altered and that there should be the power of enforcing the decree in the district in which the man happens to be at the time?—Yes.

344. Do you not think that that would entail considerable hardship in some cases? A man may sometimes *bona fide* leave a district. He may reside 10, 12 or 15 hours' distance away and can be hauled up to the Court of the other Magistrate?—I understand the principle to be that the proceedings would be taken in the new Magistrate's district to which he has moved. I think it would not be right to allow him to be sued in his new district from the Court of the original district. That, I think, was the original intention of the Bill, and that I do not agree with. I think he might be properly sued in his new district.

345. *Chairman.*] Where is the provision which makes it clear that the proceedings on a decree are to be carried on and instituted in the new district where he resides?—I do not think it is provided for yet. I think it should be.

346. There is no provision for that here?—No.

347. You think there should be such provision?—Yes.

348. *Mr. Upington.*] What is the present practice in the Magistrate's Court upon a decree being granted by the Court? Is it a writ or warrant issued to the Messenger of the Court to attach the person?—Yes.

349. What is the document called—a writ of imprisonment?—I think it is called a warrant.

350. Under clause nine it will be possible for the creditor to obtain by default in the original district a decree of civil imprisonment as against his debtor, and in pursuance of that for a warrant of civil imprisonment to be issued in the original Court and executed without more ado at the other end of the country?—Section nine says, "Whenever

any writ or warrant in execution of a judgment or decree of a Court of Resident Magistrate shall have been issued out of such Court and it shall appear that the party against whose property or person such writ or warrant is directed has no or insufficient movable property within the district of such Court wherewith to satisfy the exigency of such writ . . . " Therefore it seems to be a writ intended to apply to the amount of the judgment, "to satisfy the exigency."

351. Does not the warrant of civil imprisonment state the amount of the debt and costs, so as to give the man an opportunity of paying it before the Messenger attaches him?—In the first place you get your attachment; then you get your writ of execution and a return of *nulla bona*; and then your warrant of civil imprisonment.

352. *Chairman.*] There is an alternative in the section; you need not have this matter about the insufficiency of movable property to satisfy it. It goes on to say, "or if it shall appear that the said party does not reside or cannot be found within such district, then and in either case such writ or warrant, when endorsed by the Resident Magistrate of any other district . . . shall have the like force and effect in every respect as if it had been issued originally out of the Court of the Resident Magistrate last endorsing same." You can get it endorsed and go and operate in the other district; is that not so?—Yes.

353. Is that fair?—I do not think so. I think the defendant should have an opportunity in the Magistrate's Court of the new district of saying anything he might wish to allege against the granting of the decree.

354. In the new district where he resides?—Yes.

355. *Mr. H. S. van Zyl.*] You say that where proceedings are being taken against a man in a case like that, those proceedings should be taken in a new district?—Yes. I think the Magistrate of the new district is the man best qualified to say if the writ should be issued or not.

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356. There would be less hardship then?—Yes.

357. *Mr. D. M. Brown.*] You want him to get notice to appear before the Magistrate of the new district to show cause why the writ should not be executed?—Yes.

358. *Mr. Upington.*] Do you know from your experience of Magistrate's Court practice whether there is any rule of the Magistrate's Court that a person who is to be sued for civil imprisonment must be personally served?—I should not like to say without reference to the rules, and I could not tell what the practice is myself.

359. *Chairman.*] What is the next point?—The next is clause ten. I heard Mr. Buissinné's evidence on that point and I agree with him.

360. *Mr. Upington.*] What is your objection to the attachment of cash; what do you base that objection on?—It seems to me to be regarded as an exceptional matter even in the Supreme Court.

361. On what is it founded?—That I have often wondered.

362. *Chairman.*] May not the explanation be that cash on a man's person may be regarded as something to enable him to live for the time being, for a few days at any rate. His furniture and baggage you take, but to take the last farthing out of his pocket would be a hardship?—I think it is simply a literal construction of the words *bona et catalla*, a rigid hidebound construction probably applied by the sheriff in the old days when the law was strictly carried out, and from that it probably became customary not to attach money.

363. You do not think there is any reason for it?—Unless it might be supposed that if the sheriff took forcible possession of money it might lead to civil disturbance. That has occurred to me.

364. There is no idea of "coin of the realm" in it; no ancient explanation?—No. I do not think it would very often happen that the sheriff would have knowledge that the person had money in his actual possession. It would probably be in the bank or in the hands of some one else.

365. Would the same thing apply to scrip?—Yes; I doubt if that could or should be conveniently sold in execution.

366. From your point of view you do not see any reason why cash should be excluded from the category of *bona et catalla*?—No, except perhaps cash in the personal possession of the defendant.

367. But you do not think that cash which is in the bank or scrip representing shares should be subject to inclusion amongst movables?—No.

368. *Mr. D. M. Brown.*] Are you aware that that inclusion exists in the Transvaal?—No; I am not aware what the law on the matter in the Transvaal is.

369. *Chairman.*] What is the next point?—The next is section eleven. I have an objection to that, namely that it shifts the burden of proof. It requires the person who alleges that his property is being attached to take action on very short terms, and if he fails to do so he loses his right. I think the existing law deals with the matter. The existing law prescribes the form of action that shall be taken to institute an action to settle the dispute.

370. The onus of settling the dispute now is on the Court, and this places the onus of proof on the person who claims the property?—Yes. I think it should be on the plaintiff rather than on the claimant.

371. *Mr. Upington.*] Is not the existing practice of the Court that if property is attached which is found in the possession of the judgment debtor, then the onus lies upon the person claiming, but if it is found outside the possession of the judgment debtor, then the onus lies on the plaintiff?—Yes.

372. This, you say, shifts the onus of proof?—Perhaps I should have said shifts the onus of taking action, which might involve the onus of proof.

373. It does shift the onus of proof as well, does it not?—Very likely. I object more particularly

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that it shifts the onus of taking action; the other is not so material.

374. Where property is attached by the Messenger which is in the hands of a third party, you consider that the onus of proof should not be upon such third party but upon the plaintiff?—Yes; I go further and say that the onus of taking action should not be upon the person claiming.

375. *Chairman.*] You think the present rule and practice is sufficient?—Yes.

376. *Mr. D. M. Brown.*] You do not mean to say that the present law is that the plaintiff in the original action has to prove the ownership of the property?—I do not know on whom the onus of proof is laid on the case coming into Court. I am referring to the procedure in this section, which throws the burden of taking action on the person who claims; and I think that is wrong.

377. Would you prefer the present system that the Messenger of the Court should issue process to both parties to show cause?—Yes.

378. *Mr. H. S. van Zyl.*] Whenever the property of a third pary is attached for a judgment debt, it is usual for the debtor to be in possession of that property?—Not in a large number of cases.

379. Surely it is only right that the third party should prove that it belongs to him?—I am not talking so much of the onus of proof when the matter comes into Court. I am talking rather of the procedure adopted here. But I do not admit on general principle that because property is in the possession of a man that is legal proof that it belongs to him.

380. *Chairman.*] Surely if property is found in the possession of the judgment debtor the judgment creditor is fairly entitled to say that he regards that property as being attachable property unless some one proves the contrary?—Yes; I am not questioning the Act, but am referring to the obligation of instituting the action. The onus of proof I am not much concerned with. Each case will stand on its own merits. Take a hypo-

thetical case. Supposing a man has a bait stable; that raises the presumption that the horses in his possession do not belong to him. Then the case of a man who takes in horses and keeps them for other people raises the presumption that the horses belong to some one else. Again, in a motor garage there is the strong presumption that the cars in there belong to some one else than the owner of the garage. I am not making a point of the presumption; it is only the procedure to which I am referring.

381. You think it undesirable that the onus of initiating the suit should be on the person claiming?—Yes.

382. *Mr. C. J. Krige.*] Under this clause, if a judgment creditor lives at Caledon and under a warrant of attachment he attaches an ox in the Cape Division, and a third party claims that ox, then he would have to go to Caledon and fight the thing there?—I do not quite follow your question. If a man has property in his own division he must look after it; if he has property in another division he must put up with the inconvenience of not being on the spot.

383. *Mr. Upington.*] Mr. Krige is taking clauses nine and eleven together. Under clause nine, if a writ is issued from the Magistrate's Court of Caledon and endorsed by the Resident Magistrate of the portion of the Cape where the ox which is ostensibly the property of the judgment debtor is situated, the ox may then be attached, but the third party laying claim to it would then have to go all the way to Caledon to substantiate his claim?—That brings us back to the same point as before—the concluding portion of clause nine. The return under that clause should be made to the Court of the Magistrate who has endorsed the writ. Then all the procedure in that case would be in Cape Town, not in Caledon. The man would get the writ endorsed by the Magistrate in Cape Town; the Magistrate here would issue the writ, which the Messenger here would serve; and the Messenger would make his return to the Magistrate here.

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384. *Chairman.*] Might not that operate, in the generality of cases of that kind, prejudicially against the unfortunate judgment creditor, who would have to come from Caledon to the Cape Division to contest the suit?—I think that much more reasonable than that the man living in Cape Town should have to go to Caledon. I think if a man goes outside his own district in this respect he must submit to the consequences, and the inconvenience should not be thrown on some one else.

385. If the claim preferred by the third party were found to be unsound, he should be made to pay all the costs of bringing the other man from Caledon?—The evidence of the man at Caledon could be taken upon commission or on interrogatories under the procedure as provided now.

386. *Mr. Upington.*] It seems to me that there is a more serious objection. Suppose for a moment that the judgment creditor was at Kuruman and he proceeded to attach an ox or oxen in the Cape Division belonging to a third party, who claimed the property. The third party would have to notify the judgment creditor of his claim, and if within five days of such notice the judgment creditor had not consented to the release of such property the summons would have to be issued. The time is far too short. Do you agree with that?—I do not agree with the clause at all.

387. *Mr. D. M. Brown.*] Seeing you have raised that difficulty about having the case heard, would you not allow the Magistrate of the district in which the writ is endorsed to decide which place would be the most suitable for the case to be heard?—I have not raised any difficulty. I say I do not approve of the clause at all. I have merely answered questions with regard to difficulties; I have not made them myself.

388. *Chairman.*] What is the next point?—Clause twelve. I do not like the provision with regard to part owners of movable property. I take it that what it means is that upon a judgment being obtained against a man who happens to be a partner either in the business or in an asset——

389. *Mr. Michau.*] There is an amendment to that clause, is there not?—Yes, I find there is; the reference to part owner is struck out. Then with regard to section thirteen, the Council have no special objection to the section if it is considered to be in the interests of the public. It is very long, and I should not like to say what the effect would be.

390. *Mr. Upington.*] There is to be an out and out attachment of property belonging to a third party upon the mere affidavit of a creditor "that he has reason to believe"?—I think a better way of doing that would be, instead of having the procedure provided here, to make provision under which the matter should be brought before the Magistrate in the ordinary way; that is, summons should be issued and the matter should come before the Magistrate, who would then decide whether the property was liable to execution or not. Under this clause it is to be done by the Magistrate without evidence; then there will be summons taken out, and the matter will come before the Magistrate ultimately. I think the more convenient and proper course would be to bring the matter before the Magistrate in the first instance.

391. *Chairman.*] In the first instance should not the person whose property is affected in that way—the third party or whoever it may be—have an opportunity of being heard before the property is taken?—Yes. I think the procedure should be inverted. I think that not the Messenger but the Magistrate should figure in the first instance. I think, when you are going so far as to attach property under such conditions as this, property which is manifestly in possession of somebody else than the debtor, it would be infinitely better in the interests of the public to bring the matter before the Magistrate in the first instance; and I think the clause should be modified in that respect.

392. *Mr. Upington.*] In issuing this warrant of attachment the Magistrate is to have no discretion; provided that the affidavit is in the proper form

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the Magistrate is to have no discretion but he must issue a warrant authorising the Messenger to attach. Does it not occur to you that that may cause considerable hardship to, for instance, a small store-keeper or somebody of that kind?—I think it would do so. I think it should be put in a different form. There should be procedure under which the matter could be enquired into. The parties might be brought before the Court under what would practically be equivalent to an inter-pleader summons, and the Magistrate could then decide whether a writ should be issued against the property or not. I am not quite certain what clauses twelve and thirteen were intended to provide for, but I think the key note was the reference to part owner, which it is now proposed to leave out. If these clauses were omitted the procedure would be this: judgment would be obtained and a writ taken out, and the Messenger would be instructed to attach certain property; he would attach that property, objection would be taken to the attachment by some one else, and an inter-pleader action would follow. If any new procedure is required. I think it should be by way of summons in the first instance.

Friday, 5th November, 1909.

PRESENT:

THE ATTORNEY-GENERAL (Chairman).

Mr. Upington.	Mr. Michau.
Mr. Wessels.	Mr. D. M Brown.
Mr. C. J. Krige.	Mr. Oosthuisen.
Mr. Louw.	Mr. H. S. van Zyl.

Mr. Cronwright-Schreiner.

[In the absence of the Chairman Mr. C. J. Krige took the Chair.]

Mr. William George Fairbridge, further examined.

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393. *Acting Chairman.*] Did you say everything you wished to say on the clauses under discussion

at the last sitting of the Committee?—With regard to clauses 12, 13 and 14 I may say shortly that I fancy these clauses were drafted with a view to, or reference to part owner property. Under clause 12, if it is considered necessary to have a procedure of this kind, and that may be useful, the procedure should begin by an inquiry instituted by the Magistrate before the attachment is made, instead of having the attachment made first and the inquiry being instituted by the magistrate afterwards.

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394. But it would not frustrate the object of justice to get hold of these funds before a person who was contemplating departing could get away?—I do not think these clauses are put into the Bill as a matter of urgency. I think they are put in with a view to ascertaining who is the owner of the property, and to ascertain whether the debtor against whom judgment is to be obtained is not the owner and the property therefore liable to attachment.

395. Supposing there was a matter of urgency how do you propose dealing with it?—Well you see, even in the Supreme Court, it is a very rare thing for the Court to give an order attaching property, even if the claimant says his claim is likely to be defeated if attachment is not forthwith made, unless it is proved that the property is being removed beyond the Colony and out of the jurisdiction of the Court. Then the Court will often grant an attachment, but seldom otherwise.

396. You cannot state any reason why the practice is so in the Supreme Court? You cannot attach moneys in the possession of a third party, can you?—That is dealing with clause 10, and we are now considering clause 12.

397. Does the writ granted by the Supreme Court apply to cash in the hands of a third party?—No. The ordinary writ taken out does not allow the sheriff to attach money even in the hands of the debtor.

398. Of course the Supreme Court deals with

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larger sums than are dealt with in the Magistrate's Court, but often, up-country, a man comes into the town and runs up a little debt, after which he goes away without paying. Ought not the creditor to have power to attach the property held by the debtor before the summons is issued? If not you have no hold on that man. Take, for instance, the case of a non-resident?—If he is a non-resident you cannot sue him in the Magistrate's Court. You cannot sue him if he is not domiciled.

399. I put it to Mr. Buissinné the other day and asked him if he would be in favour of a personal service on the debtor and he said he would?—I quite agree that very often in the interests of the public generally the Court should be allowed to intervene and attach property beforehand in order that the subsequent judgment can be made effective, but the tendency of the Court is against that, and as they have taken up a position in the Supreme Court opposed to that procedure I do not think it would be wise to have it in the Magistrate's Court.

400. But the summonses in the Magistrate's Court are generally for small sums?—Well, in the Supreme Court where the sums involved are larger it is very rare for them to make an order of attachment in cases where judgment is subsequently to be obtained. They will only make it when there is proof that the property is about to be removed outside the jurisdiction of the Court and where there is no probability of executing the warrant after judgment has been given.

401. But the Supreme Court will allow the arrest of a man if it is proved that he is trying to leave the jurisdiction to prevent an action being instituted against him?—Yes.

402. Surely then it amounts to the same thing if a man comes to a small town up-country, runs up debts, and then gets away outside the jurisdiction of the Court. That is just as bad as leaving the Colony?—Wherever he may go he will

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always be within the jurisdiction of some Magistrate's Court.

403. But very often you can not trace him and if you do it is a costly business suing him in different Courts. I cannot see that there is any hardship in serving a summons on a man and attaching his property meanwhile — that is, until the suit has been heard?—The principle is this. It is not reasonable to suppose that judgment will always be obtained. To my mind it is better to follow the proper course, that is, to obtain judgment and then issue a writ of execution. That practice is clearly laid down in the Supreme Court. There they do not grant an order for attachment of property before a suit has been heard, without the very clearest evidence to show that an attempt will be made to defeat the ends of justice.

404. Take the case of a man up-country who has come into town and contracted several debts. It is known that he is leaving town by train in three hours time and a summons is taken out. The plaintiff has to wait 48 hours before that sumnons can be acted upon and in the meantime the debtor has had time to be in Johannesburg or even Bulawayo before anything can be done?—But you cannot summon a debtor in the Magistrate's Court unless he is a resident.

405. But even if he is domiciled in the place?—The case you have mentioned would refer to a non-resident.

406. Well, what are you going to do in the case of a non-resident?—You have no jurisdiction to serve such a summons on a non-resident.

407. *Mr. D. M. Brown.*] I have done it?—You may have done so, but it is not good law.

408. Take the case of an actor coming into the place and running up debts. I have had cases like that before the Magistrate?—Magistrates judgments are often reversed. I do not think these questions come under the clause we are considering now. I do not take these clauses as

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referring to matters of urgency. I take them to refer more to owners of property.

409. *Mr. Cronwright-Schreiner.*] We will take the case of a non-resident coming to a town, contracting debts and then going away. At the present time we have practically speaking no remedy. Do you not think it would be fair to serve a summons on him and then to attach his things until the suit was settled?—I think it would be quite reasonable to do so, but before that can be done you must alter the law. When you have done that you can consider such an idea.

410. *Acting Chairman.*] You are opposed to the principle that there should be attachment before judgment is obtained?—I think that in a case such as that mentioned, where a man comes into a place and contracts debts, and before he can be sued gets away over the Border, that it would not be a bad plan to give some remedy to a creditor, by allowing some form of attachment of property. But, if that is done, the law will have to be altered.

411. You are aware that under the Resident Magistrates' Court Act at present you can attach in regard to rent?—Yes, claims for rent are always regarded very favourably. In England I know the landlord's right to restrain is very favourable. It is far in excess of the right given in most other cases.

412. You are aware that under Section 73 in the Schedule of the present Act, the Magistrate can summon a person to appear before him for contravening the Act and if he does not appear the Magistrate can issue a warrant for the apprehension of such person and also if he thinks fit can impose on him a fine not exceeding £5, but that is all he can do. In the case of a witness being summoned and not appearing he can under the eighteenth section be fined and in case of not paying, the Magistrate can commit him to gaol for fourteen days. Do you not think there should be a similar penalty for not

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answering a summons. For instance a man is summoned for being drunk in the street, to appear before the Magistrate on a certain date. He does not appear. The Magistrate can then issue a warrant for his arrest and he can be fined for not answering the summons and he can also be fined for being drunk. Do you not think there should be a penalty for not appearing in response to a summons? — I fancy there is some provision made for what shall be done in a case where a penalty is imposed and is not paid and no alternative provision is made, I have an impression that there is some such Act dealing with such cases.

413. *Mr. Louw.*] It is not the intention under clauses ten to fourteen which refer to the attachment of property for debt to make such attachment easier than under the old Act?—Well these clauses ten to fourteen deal with different matters.

414. I mean as far as they refer to attachments? —I think you are referring more particularly to clause ten. With regard to that I do not see any objection to an alteration in the law, although it may not be wise to give a power that is not held by the Supreme Court. that is. the attaching of sums of money. I certainly think that that would be reasonable; but I do not think it would be desirable to give the messenger power to sell shares, because that might be affecting a Company not within the jurisdiction of the Magistrate. But what seems at present to be a hardship is that there may be a sum of money available but which under the present jurisdiction cannot be attached. I would have no objection to attachment in that respect. I would, however, limit the attachment to money, and not have shares or interests in companies outside the jurisdiction of the Magistrate attachable. You see under clause ten movable property and movables are described as follows: The terms movable property and movables, whenever used in the Principal Act and subsequent Acts dealing with civil process of Courts of Resident Magistrates. including this Act, shall be held

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to include cash or its equivalent certificates fo shares of companies and corporations and every class of effects and property other than immovable property. I would not favour the attachment of shares.

415. *Acting Chairman.*] What Mr. Louw means is do not clauses ten to fourteen tend to make attachment easier ?— No. My reading of them is that they are to enable the Court to ascertain whether property which it is sought to attach and which is in the hands of a third party, is the property of the debtor or is the property of somebody else. The proceedure it is proposed to adopt is first of all for the Magistrate to attach the property, and after that has been done it allows for the Magistrate to give his decision as to whether it is liable for attachment or not. I consider that the easiest thing for the Magistrate to do is to decide first of all to whom the property belongs and then give an order for attachment. Under the ordinary law the messenger attaches what he is directed to attach, and then if there is a claimant who is not the debtor he puts in his objection to the property being attached, and interpleader proceedings are taken. It is desirable not to have the inconvenience of interpleader actions, but it seems to me you will have to have them in actions before the Magistrate. I do not think it is desirable to have these proceedings begun on a warrant which the Magistrate will be bound to issue if the plaintiff makes an affidavit to the effect that "he has good reason to believe." On that affidavit the Magistrate must issue his warrant. I think it is rather hard on a man if property belonging to him should be attached and kept under attachment while there is a suit pending in the Magistrate's Court. I do not see why the present procedure in that direction should be strengthened.

416. Then what should the Magistrate do in such a case ?—The claimant should make his objection to the goods being attached after judgment

has been given, and then an interpleader action could be instituted. This class of thing seems to be sufficiently well provided for under the existing law. In certain cases if it is necessary to secure the amount owing let that be done by bringing the matter before the Court by ordinary summons, instead of having the property attached as suggested.

417. But would that not increase the cost?—I think the cost would be exactly the same, at any rate the cost will not be less than under this suggested procedure.

418. Very often it is found that there is not a third party to claim, and then you put the creditor to this expense?—These clauses apply only where there is pretty clear evidence that there is going to be a claimant. They do not apply to a case where the property is apparently in the possession of the defendant, but where it is in the possession of somebody else.

419. *Mr. Cronwright-Schreiner.*] Is not the procedure here just the same as under the ordinary procedure where you first have your judgment, but the only difference here is that you can attach part owned property?—But part owned property has been struck out.

420. Under clause 12, you get your judgment first?—Then that makes it even less necessary to have any alteration of the existing procedure. I think these clauses were drafted entirely in connection with the words "part owner" and intended to get at the ownership when a man had property with somebody else. I think they were drafted entirely for that purpose.

421. But in the amendment it is intended to leave out part owner?—Then I do not see that there is any necessity for the clauses if you leave that out.

422. I do not see why cash should not be attached, but I am not going into that now. What I understand is that these clauses are to make the attachment of property easier for the creditor

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than it has been in the past. Am I right in that?—I do not think the clauses in the Bill will make it easier. Now that we have struck out the reference to part owners I do not see that any difference will be made.

423. *Acting Chairman.*] Do you mean to say that under the existing law if a creditor points out to the Messenger that there are certain things in the possession of a third party which he believes belong to the debtor, the Messenger has a right to attach them?—Yes. At the present time a creditor gets a judgment and goes along to execute it. He sees a horse in the possession of a third person, and believing it to be the debtor's says to the Messenger, "That horse belongs to my debtor, attach it." He does so, and the third party comes along and says, "That horse is mine." He has to put in an interpleader action and the Magistrate deals with it. As far as I see the procedure now suggested does not give any remedy beyond that. It allows that instead of the Messenger making an attachment on the warrant the plaintiff will have to go to the Magistrate and make an affidavit, and on that affidavit the Magistrate will be bound to attach.

424. *Mr. Louw.*] I believe that in this country we have a very indiscriminate system of giving credit, which should be discouraged instead of protected. I might say that up-country there is a custom of assisting the poor man who wants to undertake some work, such as building a dam, ploughing his land or something like that. Some of the wealthier farmers give him a span of oxen for a year or so in which to carry through the work. Now if this clause becomes law these oxen will be liable to be attached if the owner of them does not come and take them. If that is so, it is going to impede that system, it will be detrimental to the whole country, for the farmer will not assist the poor man to carry out these improvements?—These clauses are not going to alter the law with regard to the ownership of property, and therefore the question will still remain as to who is the

owner of the property attached, and that the Magistrate will have to decide.

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425. *Acting Chairman.*] In a case where the debtor does not admit that the property in the hands of the third party is his, there is no provision at present under which it can be attached ?—An attachment is made if——

426. The debtor is supposed to point out his property ?—A vigilant creditor first of all makes enquiries, and if he is satisfied that the property belongs to the debtor, he instructs the Messenger to attach it, and after that comes an interpleader action.

427. But as a rule the Deputy wants an indemnity ?—If these clauses are to do away with the giving of an indemnity, I am strongly against them. If a man has reason to make an affidavit that he believes the property belongs to the debtor then he should be prepared to give an indemnity if the property is to be attached. These clauses are not going to simplify the law.

428. *Mr. D. M. Brown.*] Do you think it would be advisable to put in a clause that if goods are seized the Magistrate shall give authority to receive money by instalments and then prevent the property being sold in execution. In Cape Town and the other large towns the furniture of poor people is often seized and when sold does not realise the amount of the rent, let alone other amounts for which the owners may be sued. Would it not do, once the property has been seized to order that the property be the property of the Court, and empower the Magistrate to make an order for the acceptance of the amount due in instalments ?—That would depend greatly on the circumstances. The cost of an attachment is 7s. 6d. per day and that would come very expensive.

429. Oh, no. In the Magistrate's Court there is only one fee, that is 7s. 6d. for the attachment ? —I know that in the Supreme Court the Deputy charges are 7s. 6d. a day for maintaining his attachment.

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430. There is nothing of that kind in the Magistrate's Court?—Then I think the suggestion would be a reasonable one.

431. *Acting Chairman*]. If you allow that and limit the attachment you bring in a sort of mortgage by writ which would be dangerous?—I would not have the property ear-marked, it should still be attachable by any other creditors.

432. *Mr. D. M. Brown.*] They are not open to any other creditors now after 10 days. Under the present law they must sell?—I certainly think the suggestion would be reasonable provided it did not prevent anybody else from taking out a writ.

433. Do you think the landlords lien should extend to small rented places?—I think the landlord should have his rights.

434. You believe in the principle of the rights of the landlord, under all circumstances?—Yes; the landlord has to put his property into the possession of all sorts of tenants, and experience has taught us that tenants are going round from month to month occupying different houses for which they never pay any rent.

435. I see in Clause Thirteen it is suggested that if the property, after being attached, is left in the possession of the debtor he must find security. What is the necessity for security on the goods attached when it is a criminal offence to remove them?—Well, I suppose the plaintiff would, after the goods were attached, rather have security for them than be put to the trouble of instituting a prosecution against the person who removed them.

436. My opinion is that you must make it easier for the debtor?—I am not in favour of this clause at all.

437. Do you think it is necessary to have surety when it is a criminal offence to remove the goods attached?—That of course comes under the other clauses of the Act.

438. I could understand it when thousands of pounds were involved, but when you have writs issued for such small amounts as 10s., for we

have had writs issued for 10s. for income tax, is it necessary to give security. Supposing jurisdiction is limited to £40 or £50, is it not sufficient to have the criminal remedy at your beck without having to resort to the necessity of giving surety in addition?—The clause provides that the property shall be removed unless security is given.

439. But is that right?—Would it not be better to refer to the section in the Magistrate's Court Act?

[At this stage the Chairman entered the room and Mr. Krige vacated the chair.]

440. What does that say?—It says under sections 44 and 45 that primarily the Messenger has to remove the goods, and they are only to be left when security is given, not relying on the fact that defendant will not remove them.

441. What do you think of the idea of procedure for attachment of wages?—I do not approve of it at all. I think it would be a hardship on the working classes.

442. When I referred to that I was thinking of how successful it had been in Scotland. Say not more than 25 per cent. of a man's wages are allowed to be attached?—I do not approve of it at all.

443. *Chairman.*] Will you proceed to the next matter to which you wish to refer?—I might say that I am in favour of clause 15. I think proper cause should be shown for a debtor being released altogether. Under the Magistrates' Court Act as it stands at present, if a debtor is released from arrest he cannot be re-arrested for the same debt. In order to get away from arrest he may perpetrate a fraud by making promises to pay that he has no intention to keep.

444. I should have thought that it was rather unusual for the Court when a man undertook to discharge a debt by payment of monthly instalments to strike the case right off?—Well take the case of a plaintiff who is not very careful what he is doing. When a man makes

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a promise to pay very often the creditor gives instructions for the release of the debtor, and he cannot be re-arrested.

445. The thing which struck me and other members of the Committee in regard to this 15th section is the phrase: "and even if he shall previously for any reason whatever have been discharged from such imprisonment." He may have been discharged for most excellent reasons. What do you think of that?—If he has been discharged for good reasons then good cause for his re-imprisonment cannot be shown.

446. Do you think these words: "for any reason whatever," are necessary in this clause?—I think it would be well to leave them out.

447. Is there anything further you would like to refer to?—It suggests in clause 16 that clause 16 of the Principal Act shall be amended by the addition of the words "and why he shall not be ordered to pay the costs in and about obtaining and executing such decree, and in the next clause it suggests that clause 20 of the principal Act shall be amended to include the words "together with costs of arrest and maintenance while under arrest." I think the question of paying the costs of arrest and maintenance should be left to the discretion of the Magistrate.

448. Is it so at present?—No.

449. He may not give costs against a debtor who is imprisoned?—I think he can if the debt is not paid for vexatious reasons. I think that might be left to the Magistrate to decide. It might turn out that at first a man was unable to pay a debt, and that later when he was able to pay he would not do so for vexatious reasons.

450. *Mr. Michau.*] Do you think a debtor should be called on to pay for his cost of maintenance while imprisoned?—That might also be left to the Magistrate, but my view is that he should not.

451. Then you would suggest to take out the words "and maintenance while under arrest"?—Yes.

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452. *Chairman.*] Do you approve of the attachment of goods in respect of rent before any summons is issued simply on an affidavit made before a Justice of the Peace?—There is such a procedure now. It saves a man in many instances having to come in a long way to appear before the Magistrate when an affidavit is required on oath. I think it is quite enough to give it before a Justice of the Peace.

453. But what about the security bond?—If it is thought it is going too far the sufficiency of the bond can be dealt with by the Magistrate. It will not be necessary for a man to come a long distance to make an affidavit before a Magistrate.

454. Do you approve of clause 22 which does not allow of the enrolling of any more agents after the promulgation of the Act?—I believe there are very few places in the Colony where, at the present time there are no attorneys, and besides there are a number of young attorneys who can take up practice in practically any district. Therefore I do not think it would be necessary to admit any more agents. I do not think the interests of the public would be served by admitting further.

455. If there are sufficient attorneys to occupy these places then the agents will not be enrolled, but if you have only one attorney in a place and you cannot get another to settle there, do you think it would be wise to have an agent enrolled there?—I think there is a practice at the present time that a man can be enrolled in a place where there are not two attorneys practising. It has occurred at Simonstown, Wynberg and Woodstock. That man comes into Cape Town and puts up his notice board bearing the words "enrolled law agent," which naturally brings him custom, although he is not enrolled in Cape Town, but at Simonstown.

456. Has the Magistrate no power to deal with such a man?—He does not come before the Magistrate.

457. But the Magistrate has jurisdiction over

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a man enrolled in his court district?—I think the Magistrate would hesitate before saying that a man had acted wrongly, and take the responsibility of striking him off. I can give you an instance. There was an agent in a certain district convicted of theft. He went to the Breakwater and when his term of imprisonment was over he returned to his town and began to practise again. An agent in that district told me he went and saw the Magistrate and told him the facts and asked him why he did not strike him off. The Magistrate replied "I will do so if you bring the matter before me in the proper way." The agent replied that he would not do so, that it was for the Magistrate to move in the matter. The Magistrate did nothing, and if the man I refer to is still alive I daresay he is still practising in that place.

458. It says that such Court shall possess over all agents enrolled, like powers to those held by the Supreme Court over attorneys enrolled there. If an agent enrolled in Wynberg or Simonstown is proved to be wrongfully holding out that he is practising in Cape Town, would that not be sufficient to warrant his being brought up before the Magistrate for wrongful behaviour?—I do not see that it would. He would probably say that he was not practising in Cape Town. He might not be, but, all the same, people seeing that sign would go in to see him.

459. Is it easy to distinguish between the work of a general agent and a law agent?—Well, the work of both is pretty much the same.

460. If it is difficult to distinguish between the work of a general agent and of a law agent then a man does no harm by holding himself out as a law agent?—The harm is this. It induces people to come to him or be brought to him for such work as debt collecting and the drawing up of leases, &c.

461. Supposing that there is this evil that you complain of, does this provision of the Bill, saying

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that there shall be no more law agents, deal with it?—Before giving an answer to that I would like to say that the present law is not reasonable in one respect. I think there ought to be provision for the admission of agents in the Courts of Assistant Resident Magistrates. In other words, where a district is very large and there are few attorneys there should be some provision for the enrollment of agents. I think that any place where there is a Magistrate's Court or Periodical Court should be held to be a seat of Magistracy, whether it is an Assistant Magistracy or not.

462. *Mr. Upington.*] Is that not going very far. Look at some of the places. How could two attorneys get a living there?—I am in favour of inquiring whether the public want assistance or not.

463. *Mr. van Zyl.*] Take the case of Garies. You cannot admit an agent there because there are two attorneys at Springbokfontein?—I do not think that two attorneys should close the whole district.

464. *Chairman.*] You have not given me an answer yet. I think I asked you that supposing there is this evil of which you complain, does this provision of the Bill saying that there shall be no more law agents deal with it?—There are agents in many of these districts sailing under false colours. That is an active grievance. It is a matter in the interests of the public as to whether more agents should be admitted or not. I think it depends largely on the number of districts in which there are not two attorneys practising. If there are not many such, then it might be advisable to have more agents, but if there are only a few such districts then no more agents should be enrolled.

465. *Mr. D. M. Brown.*] I suppose you know that a great deal of private influence is brought to bear in the admitting of agents. Would you not have it that such admissions should be sanctioned by the Attorney-General?—I do not know what the influences you refer to are but

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I certainly do not think the Attorney-General should be worried with it.

466. You know that at the present time when an agent goes from one district to another, the Magistrate is approached by some friend who says "so and so is a fine chap and ought to be admitted." Do you not think that should be left to the Attorney-General?—I think it would be better that the Magistrate should stiffen his own back.

467. *Chairman.*] What is the next clause to which you wish to refer?—In regard to clauses 23 and 24 I have already made a statement.

468. *Mr. Upington.*] Before passing away from that there is a question I should like to ask and that is this. What are the relations at the present time between the profession of attorneys and law agents. As regards Magistrate's Court practice. First I would like to know if there are cases where attorneys are in partnership with law agents, secondly, whether if there is no such partnership is there any arrangement as to cases being conducted by law agents on behalf of firms of attorneys?—In a great many instances these matters have come before the Law Society. It has been represented to us that there have been partnerships between attorneys and agents. We have always taken exception to the fees of an attorney being shared with an agent.

469. Even in respect of cases conducted in the Magistrates' Court?—No, fees of the attorney as an attorney and earned in the Superior Courts. In nearly every case it is said that the partnership is in connection with work done in the Magistrates' Court, and that the fees in the Superior Courts are not shared. We have to take that explanation. We cannot get any further. As an attorney practising in the Magistrates' Court is practically in the position of an agent, we have to take matters as they stand, for we say that the law does not prohibit a partnership of that kind.

470. I was referring to what is the practice at the present time between the attorneys and

law agents, where a law agent takes cases in the Magistrates' Court for an attorney?—Well formerly it was the practice for attorneys generally to hand over cases in the Magistrates' Court to an agent, but I think most attorneys now have a Magistrates' Court branch of their own or else go into Court themselves. Of course I can only mention those cases I know of.

471. *Chairman.*] Of course, when an agent in a country town sends down work to a town attorney for the Supreme Court, he is dealt with as an attorney?—That is the case.

472. *Mr. Cronwright-Schreiner.*] I have had circulars from attorneys in town offering me half the Supreme Court fees?—That is touting, and the Society consider it a very improper practice, but the Supreme Court has held a different view.

473. *Chairman.*] Has that point been brought before the Supreme Court?—Yes, the Society brought a firm up before the Supreme Court for touting, and that Court held it was not a sufficiently improper practice to take action on.

474. *Mr. Cronwright-Schreiner.*] There is the difference between a firm of attorneys of high repute here sharing with an agent up-country and a local attorney sharing fees with an agent?—The difference is this: Sharing the fees of a partnership means that the two are together in the same business whilst the other is making an allowance, and that has existed for many years, in fact long before my time. The allowance is made on the principle of debiting the agent with the costs and making him an allowance on them.

475. *Mr. D. M. Brown.*] Are you aware that there is a practice by attorneys of giving allowances to debt collectors?—I think the giving of allowances has not been limited to professional men, and I think it would be desirable if it were. I believe there are cases in which allowances are made to certain trust companies from whom firms get their work. I think it would be desirable if that was stopped.

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476. *Mr. Cronwright-Schreiner.*] Would you be prepared to favour the admission of law agents in Native territories on the same conditions as they are admitted in this Colony?—I find it very difficult to ascertain anything about the law in the territories. It is generally to be found in proclamations. I did not know that there were no agents in the territories.

477. *Chairman.*] There are plenty of them and they are very active too?—I thought there were.

478. The next matter is making it an offence to act falsely as a duly qualified practitioner. Do you wish us to understand that the remarks you have made with regard to the conduct of some of these agents is dealt with by this clause?—That would apply to either a law agent or an attorney.

479. Will it apply to the case you mentioned from Wynberg, who has a board hung up in Cape Town?—I think it would. On several occasions the Society have had to take steps against men for practising as attorneys, but not against parties for acting as agents.

480. *Mr. Upington.*] There is one point you missed. What was the arrangement formerly between attorney and agent, where the agent undertook work in the Magistrate's Court on behalf of the attorney?—I think the arrangement was that the agent gave the attorney a share of the fees.

481. He would hand over the Magistrate's Court work to the agent, and the agent then made an allowance?—Yes, that used to be the practice, but I do not think the arrangement is often made now.

482. *Chairman.*] Do you think articled clerks should be permitted to attend Court?—At the present time under the rules articled clerks are not permitted to go into Court. I think it is desirable that at the present time an articled clerk should, after a certain period of the articles has been served, be enabled to go into Court. In that way they will gain a lot of practical experience.

483. *Mr. D. M. Brown.*] What experience does a

barrister get before he is called to the bar ?—I cannot tell you.

484. He gets none. I have seen a boy of 17 years of age earning fees for his firm in Court as an articled clerk ?—There might be an age limit, and also a service limit. Say, during the last eighteen months of his service he should be allowed in Court.

485. *Mr. Upington.*] Your idea is that it would be a useful training ?—Yes, I think it is really necessary. It is more than useful ; it is necessary.

486. *Chairman.*] A six months clerk practising on the unsuspecting public might be very good experience for the clerk, but I doubt if it would be for the clients ?—There should be a limit.

487. What do you wish to refer to next ?—The next clause is clause 25. There is an amendment proposed to that. I have some hesitation in saying anything about it It does not affect the members of the legal profession so much. I understand that the agents think the present law is not fair to them.

488. *Mr. Upington.*] Do you not see that under that clause, as it is at present drafted, the Incorporated Law Society will have to take action, for it says all such proceedings shall, as far as possible, be brought to hearing and adjudication in the same manner as complaints against attorneys, and the proceedings thereof conducted ?—There is an amendment. It certainly seems to me that the Magistrate would be the best party to deal with this.

489. *Chairman.*] Then you think it should be left there ?—If the procedure as suggested under clause 25 is adopted it will lead to additional expense. It merely makes the Magistrate a recording officer and I hold that if he takes evidence he should be entitled to send in a report.

490. *Mr. D. M. Brown.*] But the agent has a right of appeal ?—Under the proposed clause the Magistrate has to record the evidence only.

491. *Chairman.*] How are complaints against

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attorneys brought before the Supreme Court now? —By the Society, but it does not say anything in the Bill about the Law Society.

492. The clause says that the Supreme Court may inquire into any charge of misconduct preferred against any agent of a Magistrate's Court and should the same prove to be well founded, may order the removal of his name from the roll of agents either conditionally or absolutely, may suspend him from practice for a limited period or make such other order as it may think fit. All such proceedings shall, as far as possible, be brought to hearing and adjudication in the same manner as complaints against attorneys and the proceedings thereof conducted. I ask you in what manner are the complaints against attorneys and the proceedings thereon brought for adjudication before the Supreme Court?—The complaints are brought by the Council of the Incorporated Law Society under the statutory provision requiring them to do so on due cause being shown. The clause does not say *mutatis mutandis*, that they are to do the same thing with law agents. My opinion is theat the Law Society are not expected to do it.

493. Can you throw any light then on the second portion of this clause?—I did not draft it.

494. From what you say then it means nothing? —I think it was drafted in a hurry and does not mean very much. It does not make provision for a very obvious point.

495. Then there is the amendment. On that you prefer to say nothing. You do not care to express an opinion?—It is a matter for agents, and the Council has no views to express on it. If the procedure laid down is followed it will not be sufficient The Magistrate has to do more than just send in the record. The Council of the Law Society cannot take up the burden of instituting proceedings against agents. In taking these proceedings the cost is very heavy and it is very seldom recovered.

496. Do you think the procedure proposed is desirable?—No. Mr. W. G. Fairbridge. — Nov. 5, 1909.

497. Quite apart from the matter of funds you do not think it is a desirable principle?—No; it would be putting our knives into somebody else's loaf.

498. On the next clause, clause 26, which lays down the tariff of charges, do you approve of the intention that the tariff shall be railed?—I have no objection to the amendment to clause 26, but I do not see any particular reason for introducing it.

499. As far as you are aware has the Supreme Court recently increased the tariff?—I do not think they have, but they have provided for a double fee. They have given a Magistrate power to award a double fee in certain cases, but the Magistrates have set their faces against it.

500. I asked you that because I thought the Chief Justice had recently said that the Judges had made some basis of charges?—This clause is to enable a Magistrate when a case has gone out of the ordinary routine to give a larger fee.

Monday, 8th November, 1909.

PRESENT:

THE ATTORNEY-GENERAL (Chairman).

Mr. H. S. van Zyl.	Mr. Oosthuisen.
Mr. D. M. Brown.	Mr. Louw.
Mr. Cronwright Schreiner.	Mr. Michau.

Mr. William George Fairbridge, further examined.

501. *Chairman.*] What is the next point to which you wish to draw our attention?—I do not quite understand the reference in section twenty-nine to section five of Act No. 35 of 1893. I have turned up that section, and it does not fix any period. I think that must be a mistake. Mr. W. G. Fairbridge. — Nov. 8, 1909.

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502. Otherwise you approve of the section?—Yes.

503. And section thirty?—Section thirty is one of general importance; it does not affect the profession particularly, but as far as one can give one's individual opinion there would seem to be some objection to remitting a case for final decision to the magistrate who had taken that case in the first instance. There would not be the same objection if another magistrate were appointed to hear the case. The magistrate who has heard the case originally will probably have taken a somewhat active part in the matter, and cannot be quite impartial, no matter however much he may wish to be.

504. This section does not deal with that point; it deals with the prisoner's right to claim trial by jury?—I am referring to the present procedure under which a case is remitted and the magistrate disposes of it finally.

505. Do you approve of the principle in this section that an accused person who is committed for trial should have the right to claim trial by jury in every case if he so desires?—I think it is a reasonable provision. It is not a matter in which the Law Society is specially interested.

506. This is a matter of general interest and general importance, but the criticism on it would come from the administration rather than from the profession?—Yes.

507. *Mr. Louw.*] Do you approve of section thirty?—It is not a matter upon which I have any particular observations to make, speaking on behalf of the Council of the Law Society. It is a provision which affects the general public, but it does not concern us from a professional point of view. There is a good deal to be said for it, but I do not wish to say much on it, because I do not think that I can say any more than anyone else.

508. *Chairman.*] Have you anything to say with regard to section thirty-one?—I think that would be a useful clause. It must be made wholly discre-

tionary, however; if there is any doubt about its being wholly discretionary it should be modified.

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509. It says "it shall be lawful." You have no observation to offer with regard to the wide scope of the words "who are unable to attend court," which Mr. Buissinné spoke about?—I think if it is so worded that it will be wholly discretionary, then the magistrate can allow such an application if he considers it necessary. With regard to section thirty-two, as it stands now, I do not think it will do. That must be made wholly discretionary. I think I should be inclined to omit the words "and upon being satisfied that there are no reasons such as that such party or witness is suffering from an infectious or contagious illness to prevent or render such course impolitic." I should leave those words out altogether, and simply give the magistrate power on sufficient cause shown. Then I think it is hardly right to say that the magistrate shall "hold a special sitting for the purpose of the taking of such evidence at *the place* where the party or witness to be examined is." I think it should give the magistrate power to hold a commission at any place. Then after the words "exactly as if" I would omit "the proceedings were being held in the premises wherein such Court usually sits," and subsitute "such evidence had been given in Court." It will read. "...and shall be recorded exactly as if such evidence had been given in Court." Section thirty-three would be a very useful clause, but that should also be discretionary; I think the drafting of that clause might be improved. Then in line 30, in regard to evidence taken, it says "the witness shall sign the same at the foot thereof": I think that is an error, and was meant to read "the witness shall sign his name at the foot thereof." If the witness refuses to sign his name the proceedings are stayed. There should be an addition providing that if he refuses to do so the magistrate shall have power to certify the record and send it up without the signature.

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510. Is that all you wish to say about that?—Yes.

511. Have you any observations to make upon the Schedule?—Clause Two of the Schedule provides that when the parties come into Court the case shall be posponed if either side requests it. I do not think it should be bound to be postponed on the application of either party as provided for here; if the magistrate thinks fit the case should be proceeded with. I think the word "shall" occurring in lines 1 and 3 of the clause should be made "may." I would give the magistrate discretion in all these cases. Arising out of that I think it would be advisable to make an alteration prohibiting the filing of what is called the plea of general issue, because that is no plea at all.

512. A plea of general issue is really, strictly, a denial of every allegation made by the plaintiff. If you provide for pleadings where crisp issues cannot be raised, is not that plea a great convenience to the practitioner in many cases?—It is a great convenience to the defendant's agent, but I do not think it helps the case in Court.

513. Take the case of an attorney being unable to communicate with his client in time if he is suddenly called upon to plead. You must remember that in the Magistrates' Courts you have not the same scope for the preparation of pleading as in the Higher Courts?—He is not bound to put in any plea until the case comes on.

514. *Mr. Cronwright Schreiner.*] A client may only get there ten minutes before the case comes on?—It does seem to me that the plea of general issue is put in in most cases as a matter of course, and the plaintiff does not know what the defendant's evidence will be.

515. *Chairman.*] They put in a plea of general issue in the same way as you put in a prayer for alternative relief?—Yes.

516. When he does not see any other ground to defend on, he pleads to be relieved on the general issue. With regard to what Mr. Cronwright Schreiner explains to you as what does actually

happen, do you feel inclined to modify your views?—Under this provision the agent can always put in a simple plea, instead of denying all the allegations of fact, and conclusions of law, which puts everything to the issue. I think no injustice would be done by compelling parties to state their defence.

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517. *Mr. H. S. van Zyl.*] As clause two stands now, you have to bring the parties into court first before you reach the pleading stage?—Yes.

518. Is not that undesirable; does it not lead to increased costs?—I have said that I do not think this provision that the Court shall postpone the hearing upon the application of either party is reasonable; I think it should be entirely in the discretion of the Court. The Court may object to postponing the hearing in a certain case. Perhaps a case comes on, and the plaintiff has brought a dozen witnesses from a distance, and all the defendant has to say is, "I want to plead." As the clause stands, either side, without any reason, can have the case postponed to a later date and pleadings ordered to be filed. I do not quite see why the clause has been drafted in this form. I can understand its being drafted so as to allow the defendant to ask for a postponement, but what the object of the drafting is so that the plaintiff can require a postponement I do not know.

519. It seems to me that it will lead to unnecessary costs, because you have to pay the day's costs and then postpone the case?—If the matter is left wholly in the discretion of the magistrate he can make whatever order seems just in the particular case. In some cases the issue would be so clear that the magistrate would say, "There is no postponement necessary. The plaintiff is here with his witnesses and also the defendant; the defendant knows what he has to meet, and the case will go on."

520. *Mr. D. M. Brown.*] In some Courts the principle followed is that all the cases are called and no contested cases are taken that day, the

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other side having intimated that they will defend; and the magistrate keeps a permanent diary recording these postponements of contested cases. What do you think of that procedure?—I think that is reasonable, and I think it is necessary in a place like Cape Town, for this reason, that there are a good many provisional cases, and if contested cases are to be taken on the day they are called, it will mean that many unopposed cases will not come on, and the people concerned will be kept waiting for days or weeks for their cases to be called. The best procedure is that by which the Magistrate fixes certain dates for opposed cases. Of course in a country Court there may be only one contested case, and it would not be necessary to do this, nor would it be reasonable to allow the defendant to say, "I do not want the case heard to-day." In the country the practice must be for the plaintiff to be there with his witnesses, and it is not reasonable that the case should be postponed, because he may have come from a great distance. The practice in Cape Town, however, is a proper one, as I have explained, and business cannot be carried on without it. If it is all covered by the discretion of the magistrate that practice will continue in Cape Town, because the magistrate will provide for that.

521. *Mr. H. S. van Zyl.*] You think clause two should provide for that?—If it is made discretionary the magistrate will make whatever order is necessary.

522. *Mr. D. M. Brown.*] In other words, the magistrate should have discretion to let the plaintiff go on with his case, or, if he deems it expedient, postpone it for the defendant's evidence?—The magistrate should have full power in every case.

523. *Mr. H. S. van Zyl.*] You are in favour of laying down the principle that there should be pleadings in every case in the Magistrate's Courts?—I was going to make a suggestion in that connection in regard to clause three of the sche-

dule. With regard to that clause, I think the defendant should not necessarily be barred if he has not filed a plea. He may be an ignorant person, and his may be a case where the Court will hear him. I do not think there should be the same strictness as in the Supreme Court. I was going to suggest that the Rules might be altered so that if the plaintiff gave the defendant a longer time in which to appear, and gave notice at the same time to file a plea, if the defendant in such a case failed to file a plea beforehand the magistrate should take the fact of his refusing to do so into account when granting costs, whatever the issue of the case might be. The defendant will have notice to file a plea, and does not do so, and perhaps the plaintiff brings a number of witnesses who would have been unnecessary if a plea had been filed by the defendant, and in such a case the defendant should be ordered to pay the costs of those witnesses, even if judgment is given in his favour.

524. Clause three depends upon clause two, and where the magistrate has already decided under clause two that he should file a plea he must do so?—Yes, and if he does not the Court may take the fact into consideration on the question of costs, but I would not provide that he should be absolutely barred on account of not filing a plea.

525. *Mr. D. M. Brown.*] Why would you say that if the magistrate has ordered him to file a plea, and he has not done so, then he should not be barred?—Many people going to the magistrate's court do not know what a plea is. Some men would be so stupid that they could not file a plea if ordered to do so, and in such a case the magistrate must do justice between the parties, although, as I say, additional costs incurred through the non-filing of plea by the defendant should be borne by the defendant

526. *Mr. H. S. van Zyl.*] You are not in favour of a very strict procedure in the Magistrates' Courts?—No, but I should like a procedure which

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will enable the parties to know what the issues are, so as to settle them as quickly as possible.

527. I suppose in many country places you have not got a man who can put a good plea on record, and a case might be lost through a plea being badly drawn?—Yes.

528. *Mr. D. M. Brown.*] Would you alter the pleadings to a statement of defence?—The words in clause two are "a statement clearly disclosing his defence;" the word "pleadings" does not occur at all.

529. *Mr. Michau.*] What is your idea with regard to exceptions in the Magistrates' Court? We know from experience that these exceptions are constantly being raised, and as a rule they are frivolous objections. I suppose exceptions could hardly be debarred altogether?—Of course, an exception may dispose of a case. In many cases you find in a Magistrates' Court that an exception is actually a plea. Where a plaintiff sues for goods sold and delivered, you may see on the record, "Defendant excepts the claim inasmuch as he has paid the amount." That is not an exception, but a plea. Perhaps such a gross case as that does not occur, but it is an example. I must say that there is a great deal of expense incurred in connection with frivolous exceptions.

[At this stage the chairman left the room and Mr. Michau took the chair.]

530. *Acting Chairman.*] Will you resume your remarks?—Clause Five of the schedule would be unnecessary according to the manner in which clause three might be worded; if clause three is amended clause five may be unnecessary. I do not think I have any other special remarks to make.

531. I suppose you agree to the substitution of the new Rule 11, stipulating the period of within four days after appeal?—Yes. Of course there will be some verbal amendments which will follow, for instance there will have to be an amendment of Rule 12. With regard to Rule 14, this will be un-

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necessary if sections twelve, thirteen and fourteen of the Bill do not stand. There is one further point I might refer to. I believe Mr. Buissinné was asked whether any unqualified people have practised as practitioners. and whether it is necessary to have any clause against people falsely acting as duly qualified practitioners. The Law Society took proceedings against a man named Diepraem, reported in 15 "Cape Times" Law Reports, page 188. There was no order, because the man left the Colony, but there would have been an order. There was also a case against a man named Chick, reported in 18 "Cape Times" Law Reports, page 674, and a further case against a man named Rivera, reported in 16 "Cape Times" Law Reports, page 437. He represented himself as an attorney, and I believe he was subsequently proceeded against by the Medical Society for representing himself as a doctor. Those are specific cases. There have been others, which have, perhaps, not come before the Court, where people have falsely represented themselves as qualified practitioners.

532. *Mr. H. S. van Zyl.*] Has the Court any difficulty in dealing with them now; does it feel it has not jurisdiction?—It has jurisdiction.

533. In what way is the position really improved by this?—It would now be statutory, and previously the Court has simply acted in its discretion.

534. *Acting Chairman.*] Does this section not give a magistrate power over a man practising in his Court? The cases you instanced were charged before the Supreme Court?—The magistrate would clearly have power, apart from this section, to take cognisance of such a case, but I do not think many magistrates would assume the power although they really have it.

535. *Mr. H. S. van Zyl.*] Section twenty-three only really puts in statutory form what has so far been regarded as law?—What we really regard as law if often put into statutory form in this way.

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536. *Mr. Oosthuisen.*] Do you think that, as this Bill is drawn up, and with the amendments which have been suggested by the Committee of Legal Practitioners, there will be more work thrown on the Magistrates' Courts?—There will be to some extent. It will enable cases in which damages are claimed not exceeding an amount of £40 to be brought into the Magistrates' Courts.

537. You think that is one of the advantages of this measure?—I think it is necessary to enable such cases to be brought.

538. You believe it will materially help the public?—I think most of the provisions in this Bill help the public. Some I do not approve of, but others I do. For instance, I do not think sections twelve, thirteen and fourteen will help the public, and I have already said so.

539. *Acting Chairman.*] On the whole do you think it will cheapen litigation?—The procedure instanced of having a plea filed before the parties come into Court, as I have suggested, would cheapen litigation, because it would often render it unnecessary to bring witnesses up twice.

540. *Mr. Cronwright Schreiner.*] It will cheapen litigation also by enabling more cases to be tried in the cheaper Courts?—Yes; it will cheapen litigation where increased jurisdiction is given.

541. *Mr. D. M. Brown.*] Are you aware that in Natal the magistrate has jurisdiction in ordinary cases up to £300?—I do not know the Natal law.

542. Do you not think the limit of £40 is much too low if it is with a view of benefitting the public?—I think it might be increased to £50, but it would be advisable to stop at £50.

543. In the Transvaal and O.R.C. it is £100?—I do not know what class of magistrate they have there, nor what the circumstances are. I understand the Magistrates' Courts in both these Colonies are somewhat differently constituted.

544. Your reason for not advocating the increase is in consequence of the magistrate not being able to adjudicate on such a large amount as £100?—

Because the cases involving larger amounts often present a good deal of difficulty, and I do not think the magistrates are qualified in every way to deal satisfactorily with them.

545. From the point of law?—From the point of law and also judging the facts. The judgment of the magistrate on the question of facts is often exceedingly unsatisfactory.

546. Would you be in favour of inserting a clause to refer points of law to be argued before a Superior Court?—That can be done on appeal, as at the present time, and I do not think that suggestion would cheapen the cost in any way.

547. Can you give any material reason, other than the question of its being impossible for the magistrate to deal satisfactorily with facts and points of law on questions involving an amount of £100?—The jurisdiction of the magistrate is limited because he is not supposed to be sufficiently well acquainted to deal with cases above a certain magnitude; that is the whole principle.

548. With the exception, say, of actions of tort, the magistrate would be able to deal with ordinary cases up to £100?—There is jurisdiction of different amounts in different cases. The point is whether it should be increased, and I think it should be increased to £40 or perhaps £50 in all cases, but I do not think it is advisable to go beyond that.

549. Would you not go to £100, making it uniform with the O.R.C. and Transvaal?—No; I do not see any particular advantage in uniformity in that respect.

550. *Mr Cronwright Schreiner.*] Would it mollify you on this point if adjudication on an amount of, say, £100 were confined to magistrates and assistant resident magistrates to an amount of £50?—I do not think I am in a position to say whether such a distinction could be drawn; I do not sufficiently know the difference between the two classes.

551. *Mr. H. S. van Zyl.*] Assistant resident magistrates are very often young men with little experience, and it is certainly not desirable that

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they should adjudicate upon cases of very great amount?—That, I think, is one of the reasons why the jurisdiction is limited, because very often these cases come before an acting magistrate, who is not always qualified. I think they take it on the average qualification of the magistrates. Some magistrates who are older are less qualified than the younger ones.

552. *Acting Chairman.*] And there are some districts where the assistant magistrates are far better qualified than the resident magistrates themselves?—That may be.

553. *Mr. D. M. Brown.*] Practically, you would be against adjudication above a certain amount by magistrates with less, say, than ten years' experience; would that meet you?—No. A man might not have had a great deal of experience as a magistrate, but have been employed in the Attorney-General's office for some time and have a great deal of legal experience.

[At this stage the Attorney-General returned, and Mr. Michau vacated the chair.]

554. *Mr. Michau.*] I presume you agree generally, on behalf of the Law Society, with Mr. Buissinné's evidence in regard to the Secretaries of Divisional Councils appearing before any magistrate's Courts?—I was not quite clear as to what his evidence on the point was. I think in the collection of rates and matters of that kind there is no objection to the Secretary of a Divisional or Municipal Council appearing, but in cases which are not matters of rates I do not think he should be allowed to appear. He could appear in cases of rate collection, and also proceedings under the Small Debts Act, but I do not think there is any reason to give a body of that kind a special privilege; and I certainly do not see the object of giving a "company or corporation"—which I think are the words in the new Rule of Court—power to appear in that way.

555. *Mr. Cronwright-Schreiner.*] Would you confine it to public bodies?—Yes, in respect of rates.

556. *Mr. Michau.*] Does not that rule apply to secretaries of companies?—Yes; I do not see why companies should have that privilege.

557. Mr. Buissinné told us that, as President of the Council of the Law Society, he had made representations to the judges to abrogate that rule, because he did not think it was fair to the profession; but I take it that was only his own view?—That is the view of the Council.

558. *Mr. H. S. van Zyl.*] Do you think it would be fair to the public to abrogate that rule?—Attorneys and agents are members of the public also, and are admitted to practise in these Courts, and they should have a certain amount of protection.

559. Seeing that the plaintiff or the defendent can appear in person if they choose, why should not the Divisional Council be allowed to appear through its secretary, who very often is an attorney?—If he is an attorney or agent then there is no objection. Experience tells us that when unqualified persons appear in Court the proceedings are protracted, and are usually more expensive.

560. *Mr. D. M. Brown.*] Is not the Secretary to the Company in the same capacity to the body corporate as the individual is to himself when appearing for himself?—The body incorporates itself, and gets certain privileges as such, and it naturally follows that there are certain disadvantages to the Company in respect of its being unable to appear in Court itself, and I see no reason for a special Rule of Court to relieve it from the effect of its being a Company.

561. Supposing it is a very small action over some trifling matter, apart from rates, and the Secretary to the Divisional Council is better able than any individual to appear before the Court, by reason of knowing the facts, why should he not appear in the Magistrate's Court?—I will put it from this point of view, that professional men are subject to many disabilities, and they have to

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qualify themselves, and I think it is unreasonable to allow some one who has not the same ability to appear.

562. It is only in the interests of the legal profession that you give this answer?—Partly that, and partly because when unqualified persons appear the proceedings are generally protracted and more expensive. That is not always the case, but usually it is.

Mr. William Bunting Shaw, examined.

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563. *Chairman.*] You are an Agent-at-Law, practising in Cape Town?—Yes.

564. As a matter of interest, is your practice confined to Cape Town, or one particular Court?—I practise in the Peninsula as well as the Cape Town Courts.

565. Have you been admitted in the other Courts too?—Yes; I have also practised in Graham's Town, Port Elizabeth, Kimberley, Cradock, and other places.

566. How long have you been in practice?—Since 1878.

567. You are the Secretary of the Committee of Legal Practitioners which is responsible for drawing up this Bill?—Yes.

568. That Committee is also responsible for the proposed amendments of which a copy has been put in to the Select Committee?—Yes.

569. Are we to take it that the Bill, with those amendments, represents the views of this Committee of Legal Practitioners?—Yes, that is so. The amendments were drawn up at the suggestion of the Incorporated Law Society, after consultation with them.

570. I suppose this Committee of Legal Practitioners represents the practitioners in the Magistrates' Courts here?—Yes.

571. Because I see it consists of attorneys as well as law agents?—Yes, all practitioners.

572. Before coming to specific clauses, are there any observations you desire to make upon the Bill

in general?—I should like to make this remark, that the Committee has only dealt with matters which they consider to be of absolutely pressing necessity. A large number of other recommendations were sent in, which were not considered so pressing as these which have been dealt with in the Bill; the Bill only attempts to deal with things which the Committee thinks are of an urgent nature.

573. Is that all you wish to say about the Bill generally?—Yes.

574. You have been present during the greater part of the examination of Mr. Buissinné and Mr. Fairbridge, and have heard their evidence?—I have heard part of Mr. Fairbridge's.

575. Without taking you through the Bill clause by clause, have you made notes of anything you wish to say to the Committee regarding the criticisms which have been addressed to the Bill?—Only mental notes.

576. In several respects they have criticised sections of the Bill unfavourably?—I have only been here for a short time during Mr. Fairbridge's examination, and not when Mr. Buissinné was examined.

577. Take the question of jurisdiction; what do you say with reference to sub-section (1) of clause six?—Do you agree that the object of that sub-section is to give the Magistrates' Courts jurisdiction in respect of foreign judgments?—Yes.

578. At present they have jurisdiction up to £200 on liquid documents?—Yes.

579. But this is to enable Magistrates' Courts to deal also with foreign judgments in liquid cases?—Yes.

580. What experience have you had of instances arising in which it was desirable that a Magistrate's Court should have power to deal with foreign judgments?—I only know of one instance—I will not mention the names—which occurred a few months ago in Cape Town.

581. One case?—Yes. The defendant was a person against whom it was hardly worth while

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incurring heavy costs in the Supreme Court. It was practically admitted that the judgment was a judgment of the Court in Germany, and yet I believe nothing came of the case, in consequence of the expense of going to the Supreme Court. The exception was taken that it was not a question within the jurisdiction of the Magistrate's Court.

582. *Mr. D. M. Brown.*] Is that the only case of the kind you have known in your 31 years experience?—Yes.

583. *Chairman.*] In view of the fact that you only know of that one case, is there any necessity for that clause. You said the Bill only included necessary matters?—I think everything is necessary which tends to reduce the cost of litigation.

584. Do you not think that there is a considerable objection to allowing Magistrates' Courts to deal with such cases, in view of the important questions of authentication and so forth which arise in connection with such matters?—The Committee had necessarily to take up this question of jurisdiction, and this provision was proposed by some of the members and was carried by the Committee.

585. You prefer not to give your own view?—I prefer not to give my own view on that particular point.

586. What do you say in regard to the suggestion that instead of £50 in sub-section (2) of section six the amount should be £40?—I do not see the slightest difference in making the amount £40 or £50. Higher amounts were mentioned, and £50 was adopted as a minimum compromise by the Committee.

587. You are doubling the present jurisdiction, because it has hitherto been £20?—Yes.

588. You say £50 is the minimum?—The Committee thought that was a very reasonable amount.

589. In regard to sub-section (3) of the same section, first of all I take it that it is quite clear that the object of this sub-section is primarily to allow any claim in reconvention for damages

equivalent in amount to any amount claimed on liquid documents under the jurisdiction given by sub-section (1)? You have there a new provision that the magistrate shall have jurisdiction in all these cases up to £250, and you are now going to provide that in such a case the defendant can counterclaim in damages up to £250?—Yes.

590. Do you think that is desirable?—I think it is absolutely necessary.

591. Why?—It does not always follow that the person who sues is the original holder of the note that is sued upon, and the man sued may have a claim against him for damages, and I do not see why in that case the defendant should not have the right to set off his counter claim, provided that the old regulation was still in force that the matter might be moved into the Supreme Court upon security being given for costs. I think if people want to go into the Supreme Court in a case of that kind there should be security given for costs on the part of the person wanting to go to the Supreme Court, when he can get the law supplied from a cheaper source.

592. Under this you give the magistrate jurisdiction to try claims up to £250?—Yes. I do not see why a man should be barred from setting off his claim for £250 when the other man is suing him for that amount.

593. Is there not a world of difference between a liquid action for £250 and a counter claim which may perhaps involve ticklish points of law?—If the defendant was claiming £250 from a man who was suing him for £250 I should consider it fair.

594. Then according to you we need have no Supreme Court?—But there are many cases involving far bigger amounts.

595. According to your view it does not matter if the amount is £5 or £5,000, because a claim for damages may involve complicated questions of law?—I consider that if a man has any right to set up a counter claim he should have a right to do so for the amount he is sued for. The wording

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in Act No. 43 of 1885 is to that effect—that a person can set off a counter claim to the amount of any liquid claim made against him. That is how it stands at present. The law at present is that the magistrate has jurisdiction to try any plea of counter claim or set-off, when sued on a liquid document, to the amount of that liquid document. You will see that sub-section (4) of section eight of Act No. 20 of 1856. as amended by Act No. 43 of 1885. reads as follows: "As often as any action or suit shall be brought upon any liquid document for any sum exceeding one hundred pounds as aforesaid, the resident magistrate shall have jurisdiction to try any plea of set-off or compensation, or any cross case or claim in reconvention not exceeding the amount demanded by the plaintiff in his summons, whether the plaintiff shall or shall not succeed in proving the amount so demanded to be due." There you have a provision that if a person is sued for over £100 he can put up a counter claim for an equivalent amount. Some magistrates hold that you cannot do this if the amount sued for is less than £100. In the case of the present Bill the provision is that a counter claim can be made up to the amount of £100.

596. *Mr. D. M. Brown.*] No magistrate I have known has upheld the view that you can go for any amount. Have you had cases?—I have known hundreds of them, and never had the question raised.

597. Perhaps a large number, but surely not hundreds?—Yes, hundreds.

598. Of a counter claim when the amount was over £100?—Yes. At present if a man has a counter claim for more than £40 the magistrate will take evidence, and if he finds that this sustains the counter claim the case has to go to the Supreme Court. It seems utterly absurd to say, under the existing provision, that a man cannot set up a counter claim for an amount less than £100, but can do so for an amount of £250.

599. Has that been pointed out in any case in

Court ?—It has been held that you may not put up a counter claim for a less sum than £100, if it exceeds £40, but you can for £200 or £250.

600. *Chairman.*] There appears to be something in your point, and the question is whether there should not be some clause to disallow that jurisdiction ?—Personally, I quite agree that this section at present would require an amount of elucidation, because at present it would mean that a magistrate would have jurisdiction up to £400 and jurisdiction on a counter claim up to £400.

601. How do you get £400 ?—He would have jurisdiction for £250 on a promissory note, £100 on goods sold and delivered, and for £40 or £50, as the case might be under this new clause, for damages, and he certainly would have jurisdiction on an unliquidated claim for breach of contract. The magistrate could have jurisdiction up to that amount.

602. *Mr. D. M. Brown.*] He could try a case involving a total sum of £800 ?—Yes.

603. *Chairman.*] At the same time, on your principle, the amount of money does not really matter ?—That will go a little beyond my principle, because it includes so many different things.

604. *Mr. Cronwright Schreiner.*] You mean it would not matter as a point of law ?—Yes.

605. *Mr. D. M. Brown.*] Do you really think that if a magistrate is only fit to adjudicate on amounts up to £50 under the ordinary jurisdiction you should increase his jurisdiction on a claim in reconvention ?—I would not express an opinion on the fitness of magistrates.

606. You miss my point. By law we only give power to deal with a case in convention up to £50, but immediately your principle is allowed you allow a claim in reconvention up to £250. Does that seem sound ?—I do not see that it applies.

607. *Chairman.*] If the magistrate is not to be considered sufficiently a fit and proper person to

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try a claim for damages for more than £40 or £50, as the case may be, how is he fit to try a counter claim for a bigger amount?—I think it is simply a question of expediency and public interest, and not a question of fitness. The Committee approached it simply as a matter of expediency and in the interests of the public.

608. When I use the words "fit and proper person" I mean where his Court is not such a Court as would be fit and proper for hearing such claims. The principal of limitation of jurisdiction in inferior courts is known all over the world?—Quite so.

609. Why is the jurisdiction of an inferior court limited; what is the principle?—To enable the public to get cheaper law. You have courts of inferior jurisdiction because they give cheaper and quicker law.

610. To your mind there is no distinction between the character of the tribunals; that does not enter into the question?—I do not think it enters into the question at all.

611. Why not have your cheap litigation all round?—Because you have larger interests at stake, perhaps, in land cases and cases of wills and matters of that kind, and it is necessary, where there are such large interests at stake, that you should have specially qualified men to deal with these cases.

612. Then the quality of the tribunal does enter into the matter?—It does to that extent, certainly, but not necessarily as a question of jurisdiction. The point is that I do not see why a magistrate should have jurisdiction against a man owing another man money, and yet the defendant has to go to another jurisdiction to get his own money.

613. *Mr. D. M. Brown.*] Would you meet it by saying that if the magistrate is satisfied of the existence of a *bona fide* counter claim he should dismiss everything, and allow no procedure to go on?—I do not say that, because you give the magistrate jurisdiction to £250 under the law at present.

614. *Mr. Cronwright-Schreiner.*] Your point is this, that in regard to the work with which the magistrate deals the only consideration is expedition and expediency in the public benefit?—That is the only consideration as far as I am concerned.

615. There are certain things which should go to specially qualified people, but where he has jurisdiction that point does not arise?—Just so.

616. His competency in the class of work in which he has jurisdiction is not in question?—It is not in question in my mind at all.

617. *Mr. D. M. Brown.*] If it is not fit to try more than £50 in convention, why should it be fit to try a counter claim of £250?—I see no difference, in the case of a man sweeping a chimney, between his causing 5s. or £5,000 of damage; I see no difference in the jurisdiction. The question then is whether he swept the chimney properly or not, and the magistrate can determine that question whatever the amount of damage.

618. *Chairman.*] But there is so much difference in the kind of cases on which claims are founded. There are two ways in which it is desirable to limit the jurisdiction of lower tribunals—one where the amount may be small, and secondly where the subject matter is involved, and the jurisdiction is limited according to that subject matter?—But that is not provided for in this Bill. With reference to section four of the Bill, I do not know if any difficulty has arisen over this. It is intended to deal with the question of "residing." You are aware that there has been a great deal of difficulty arising in those cases. You have a company, and three members of the company may reside one in Simonstown, one in Wynberg and one in Stellenbosch. At present it is somewhat a difficult question.

619. How do you get on any further with this section?—Because it provides that the magistrate has jurisdiction where the company is carrying on business.

620. With regard to section seven, do you not

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consider it is going too far to allow the magistrate power to refer the whole suit to an outsider?—That is not intended; the clause has since been amended, as will be seen in the list of amendments which has been put in.

621. Do you agree with what has been said, namely, that this should be confined to matters of account and scientific or technical matters?—Quite.

622. Accounts and technical matters involving expert knowledge?—Yes; I quite agree with that.

623. What do you say with regard to the suggestion that such a referee's report should be open to examination and cross-examination in Court by the parties?—I think the whole object would be defeated.

624. Have you anything to say with regard to section nine?—I think it is absolutely one of the most necessary clauses in the whole Bill; in fact unless this provision is made we must go on failing to recover money everywhere at present.

625. *Mr. H. S. van Zyl.*] Take the case of suing a man for civil imprisonment if he has gone to another district?—I think he should be sued in the original district in which judgment was taken against him.

626. And you would make him come back?—Yes. I do not think the creditor who has supplied him with goods should have to chase him about the country.

627. Apart from the matter of civil imprisonment, you must go to the jurisdiction of the defendant if you do not reside in the same district?—Yes.

628. Why should you treat the question of civil imprisonment differently?—Where an action has once been commenced in one Magistrate's Court, it should be continued in the same Court.

629. But if the case for civil imprisonment has not been commenced, should you not go to the jurisdiction where the defendant resides?—Not for civil imprisonment. I think that when you

have once got judgment against a man, and he leaves the district, he should be amenable to the jurisdiction of the district where the judgment was originally given. There would be no prejudice against him, because the Court would require to be satisfied that there had been proper notice to the defendant. Mr. W. B. Shaw. — Nov. 8, 1909.

Wednesday, 10th November, 1909.

PRESENT:

The ATTORNEY-GENERAL (Chairman),

Mr. D. M. Brown,	Mr. Louw,
Mr. Cronwright Schreiner,	Mr. Michau,
Mr. Oosthuisen.	Mr. C. J. Krige.

Mr. William Bunting Shaw, further examined.

630. *Chairman.*] Have you finished the observations you desired to make with regard to section nine?—Yes, only in regard to that section I have since had the opportunity of reading the evidence given by Mr. Buissinné and Mr. Fairbridge, and I see, according to the evidence given by them, that they fail to see that this section provides for the continuing of the process. To my mind it is absolutely clear. They do not see that there is provision made in this section for reaching a man with a writ of civil imprisonment if he is in another district. Mr. W. B. Shaw. — Nov. 10, 1909.

631. You read "judgment or decree" to include civil imprisonment?—Yes. I take it when a suit is commenced in the Magistrate's Court it is not finished until proceedings for civil imprisonment have terminated.

632. Do you take that view?—Yes, and the view is in practice as well as in theory, because every power that is given to an attorney or an agent to

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sue in the Magistrate's Court, contains the provision "to proceed to the final end and determination thereof," which includes the process for civil imprisonment.

633. Civil imprisonment is not specifically mentioned?—No; but to proceed to the final end and determination thereof.

634. Would you say that in every case, generally speaking, determination of a suit includes proceedings for civil imprisonment?—Where necessary, certainly.

635. Is not the judgment and the issue of the process of the Court after that judgment the termination of the suit?—I do not think so in the Magistrate's Court. Presuming that it is necessary to go as far as civil imprisonment, the proceedings are not terminated until you have exhausted all your legal remedies, otherwise you would have to get a fresh power in order to execute your writ.

636. Is that all you have to say?—That is all with reference to that.

637. In regard to section ten, will you tell us why you desire to make this departure now in the way of including cash and scrip certificates in chattels—movables?—I think it was suggested to the minds of the Committee by the fact that a large number of persons obtain licences to keep shops, and then when they have incurred liabilities they sell out all their goods and keep the money. The principal object was to get at money in the possession of such people if possible, and also money that was in the till. This power is possessed at the present time by the Messenger of the Master, who, in the case of going to make an attachment in an insolvency under the Insolvency Act, can go to the till or anywhere else where he can get money belonging to the party, and he does attach it.

638. Surely there is a great difference of principle between an insolvency and the issue of a judgment against a man by the Court. Of course when a man is insolvent none of his property

belongs to him—it all belongs to his estate—but where a judgment has been issued against a man his property does still belong to him except to the extent that he is expected to satisfy the judgment?—If it can be attached by an order of the Supreme Court there can be no difference in principle in allowing it to be done in the Magistrate's Court; the only difference is the mode of procedure. Mr. W. B. Shaw. — Nov. 10, 1909.

639. You are providing here that it shall be attached just by the issue of the writ; movables are to include cash and scrip certificates?—Yes, because it is all protected by the provisions protecting any movable property; we seek to put the money and scrip on the same footing as other movable property.

640. Under the Supreme Court process, if you want to get hold of cash or shares, do you not have to get a special order?—Yes; but Mr. Buissinné is wrong in regard to the procedure in the Supreme Court. He leads it to be believed that you have to give notice to the man that you are going to apply to attach these things. As a matter of fact, you have to get an interim interdict, and then you give notice to the man that you have got the property attached, and he has to appear before the Court to make any objection.

641. But that is not provided for in this section; the section says that movables, *ipso facto*, are to include cash and scrip?—Under the principles governing all writs.

642. This is a question of extending the definition of movables to what has always been—to my mind with good reason—kept out of that definition?—I do not see why it should not be included, because the same rules in regard to attachment would apply. No man's goods can be attached without his having a remedy. If it is a provisional judgment it can be annulled, and if it is a final judgment the man can go to Court and say that the things are not liable to attachment.

643. Why not provide that you can attach his

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suit of clothes in the same way?—Because under the Act wearing apparel and tools of trade are specially excepted.

644. *Mr. D. M. Brown.*] Up to a certain value? —Yes; but beyond that we should not hesitate to attach.

645. *Chairman.*] I know that is so, but what is the difference between a sovereign a poor man may have in his pocket and the suit of clothes on his back? You want the power given, *ipso facto*, to attach that sovereign, which may be his last. Why not take the suit of clothes also?—The Act would have to be exercised reasonably, and that difficulty could easily be got over by an exception being made, as in the case of wearing apparel.

646. The exception of the wearing apparel is absolute; the man's wearing apparel is not attachable?—Up to £5 value.

647. And what are you going to say here?—Say exactly the same, if necessary, as in the case of wearing apparel and tools of trade.

648. That the cash is not to be attached up to the value of £5?—That might be provided.

649. *Mr. D. M. Brown.*] Do you really mean that, supposing a man is a shopkeeper, all the money in his till above the sum of £5 shall actually be drawn out from the business for that special creditor?—Yes; it is the money of the creditor who has sold the goods to him.

650. *Chairman.*] But the judgment may be at the instance of another previous creditor to the one who has sold him the goods?—The new creditor can protect himself by issuing a summons and joining *pari passu* within ten days.

651. The other creditor may know nothing about this; during that ten days he may be at the other end of the country. After all, that does not seem to me to be really the point; the point is the removal of the distinction that has hitherto been observed in the Magistrate's Court and Supreme Court practice between movables generally and

cash and scrip?—I would remark, of course, that if the goods in a shop can be attached for a debt twelve months' old when they were sold to him the day before, why not the same with cash. Some men, for instance, who are sued in the Magistrate's Court have a small account in the Savings Bank.

652. *Mr. Cronwright Schreiner.*] In fact it is a custom with some people to pay money into the Savings Bank and then not pay debts?—Yes.

653. *Chairman.*] But you only have to get an order to make him pay?—It costs you £9, because at present you have to go to the Supreme Court to do it.

654. In a Magistrate's Court case?—Yes; you must go to the Supreme Court.

655. If you get a Magistrate's Court judgment you cannot attach the man's cash?—Not on that.

656. What have you to do?—You have to take out a writ in the Magistrate's Court and get your return of *nulla bona*, which may take a week or more. Then you have to go to the Supreme Court and get a judgment upon the judgment of the Magistrate's Court, and when you have the Supreme Court judgment you again go to the Supreme Court and make an application to attach the cash. This perhaps takes three or four weeks, and costs you £9 or more.

657. Have you any objection, if the Committee should decide to accept the principle of this, to providing that the cash and scrip should not be attachable merely upon the judgment, and that there should be a special order obtained from the magistrate?—That would suit the wishes of my Committee.

658. Upon notice to the defendent?—It might be done temporarily and notice given afterwards.

659. The same as a temporary interdict?—Yes.

660. But your clause does not apply for that at all. You have made a sweeping change, so that you can at once take all the money he has. If he owes more than he seems to have you can take everything that happens to be there?—That is so.

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661. *Mr. Cronwright Schreiner.*] But that is not the case really? You do not propose, in the attachment of cash or scrip, to omit any step which is now used to attach property?—Certainly not.

662. If you do not attach the property there is a practical certainly that the other creditors will not get that cash?—Certainly.

663. And the other creditors are not prejudiced any more than if you attached goods which may be turned into cash?—Yes.

664. And, moreover, you do not propose to attach more than is sufficient to meet the debt?—Just so.

665. *Chairman.*] You say you do not omit any step that is necessary to attach other property?—Yes, we mean interpleaders or anything of that kind.

666. The whole point is very simple; it is that you are here providing to attach cash and share certificates simply under a judgment of the Magistrate's Court without any further proceedings, just like other movables?—Just like other movables.

667. You will not have to go to the Supreme Court, as at present, to get judgment and go through the process you have told us about in order to attach movables as at present defined?—We cannot go to the Supreme Court at all to attach movables on a Magistrate's Court judgment.

668. You attach on your judgment?—Yes.

669. But to attach the cash and scrip you have to go to the Supreme Court?—Yes, after obtaining judgment there.

670. And you propose that that process shall be omitted?—Yes, to simplify the matter.

671. *Mr. D. M. Brown.*] Would you be satisfied to insert in the Bill a provision to give the Magistrate, up to his jurisdiction, the same powers as the Supreme Court possesses in regard to this matter of cash? Would you be satisfied if the Magistrate had power, on affidavits before him, to order attachment of cash in the same way as the Supreme Court?—Certainly.

672. *Mr. Cronwright Schreiner.*] What safeguard would you give a creditor in regard to a person who contracts a debt and goes away ?—You have your remedy provided in section four of the Bill ; the magistrate shall have jurisdiction in regard to any person residing in his district. Mr. W. B. Shaw. Nov. 10, 1909.

673. Suppose he goes with all his belongings ?—You get judgment in the Court in which you have issued your summons, and you can take out any further process of the Court and follow him wherever you find him without suing him in a fresh district.

674. *Mr. D. M. Brown.*] That is under this Bill ?—Yes.

675. That is always assuming he has remained in the jurisdiction of the Colony ?—Yes.

676. *Chairman.*] Have you anything special to say with reference to interpleaders ?—With regard to interpleader suits I must say, with all due deference, that Mr. Buissinne is absolutely at fault in regard to the practice of the Magistrate's Court ; he appears to know nothing about it ; what he has said about the practice is in variance with the practice from A to Z. At present, instead of an affidavit being filed and the Court issuing process, nothing of the kind is done. To begin with there is no affidavit. As far as my experience of over 31 years goes, I do not know that I have heard of a single affidavit in the case of interpleader suits. What happens is this. When the Messenger attaches goods the man says, " Those goods are not mine," or after he has attached them and left his notice with the debtor someone goes to the Messenger of the Court and says, " Those goods are mine." The Messenger says, " Will you mind putting it in writing," and in some instances the man writes a letter, or the Messenger turns up the corner of his writ, and the man writes " I beg to claim the goods attached this day," and signs it. That is given to the Clerk of the Court, and an interpleader summons is issued by a practitioner

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in the Court, and charges are made for it exactly the same as an ordinary summons, and all the expense is gone to in that interpleader suit exactly as in the case of any ordinary summons. This has particularly been the case within the last few years, because under the Stamp Act provision is made for putting a 5s. stamp upon interpleader summonses, and the Clerk absolutely refuses—though requested to do so—to issue this unless he gets the 5s. stamp.

677. Which Stamp Act is that?—The one of about ten years ago. Then the claim is filed, and there it lies. There are writs in the different Courts which have remained there for years in regard to goods which have been claimed when under attachment, and nothing can be done, because probably the man claiming knows he has no right to the goods, and the man who has attached originally knows that the claimant is a man of straw. In ninety-nine out of a hundred claims that are made for small debts the interpleader claims are made by men of straw. It is not worth following up because the expense of the interpleader would swallow up the whole profits and the lawyers would get everything and the creditor nothing. That is what invariably happens, and it is because of that that this section is introduced. In the Magistrate's Court here to-day there are more than a dozen writs which have been lying there for months, and some of them for over a year, in which the goods are not released from attachment and nothing is done because the claimant is a man of straw. A man only has to say to the Messenger, "I claim those goods," and the whole procedure is hung up for ever, because the creditor who has got his judgment and attached these goods in the very possession of the person against whom he gets this judgment is called upon to fight an interpleader suit in ninety-nine cases out of a hundred with a man of straw, and in many instances with a woman who is a concubine of the man in whose possession the goods have been

attached, or an illegitimate son, the offspring of such concubinage. I assure you that any practitioner in Cape Town, where you have this mixed population, will tell you that this is a thing of almost everyday occurrence. Mr. W. B. Shaw. Nov. 10, 1909.

678. Do your observations apply to sections twelve, thirteen and fourteen, because they seem to hang together?—Yes.

679. *Mr. Cronwright Schreiner.*] The goods will be realised for the benefit of the attaching creditor unless interpleader summons is issued?—No. If a notice is given that the goods are claimed the goods are not sold at all unless the interpleader action takes place.

680. *Mr. C. J. Krige.*] With regard to section eleven, you say the summons must issue out of the Court which granted the original judgment. Will not that make the process more expensive than if the interpleader summons were issued where the man resides?—Under the existing law the interpleader suit must be issued in the Court in which judgment is given. That was done in a case in which the judgment was taken at Stellenbosch or Cape Town, or *vice versa*. The goods were claimed in one district, and the Supreme Court held on exception that it was necessary for the interpleader action to be brought in the Court in which judgment was issued. It seems to me it would be far more convenient to have the whole process decided in the one Court, because otherwise in the case of an appeal, for instance, you have to go to different Courts and get different records, and the cost is considerably increased.

681. But will it not tend to reduce the cost if you obtain judgment in the district in which the claimant lives?—No, because goods attached in Cape Town may be claimed by a man living in Caledon, who may be a stranger or a man who has lent the goods to the man in whose possession they are found. If the man has goods in his possession credit is given to him on the appear-

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ance that he presents; he is seen with these goods and credit is given to him, and then when these goods are attached—say a span of oxen or furniture or anything of the kind—you have to go to Caledon to find the man from whom he has borrowed the goods, or who perhaps has a fictitious claim against him. I may be a little prejudiced, but I may say this Bill has been considered almost entirely in the interests of the creditor; this provision is in the interest of the creditor who has got his judgment.

682. *Mr Oosthuisen.*] It appears from your explanation as if the man in Caledon would have no rights; his things would be sold?—He would have a claim.

683. He is the third party. Will he get notice?—If a man in Caledon lends goods to a man in Cape Town and that man gets credit upon the strength of those goods, and no notice is given to the public, surely the man in whose possession the goods are found will advise the person from whom he has received the goods that they have been attached; so that he will then simply have to say within five days, "Those goods are not mine," and he can communicate with his friend and in seven days an interpleader summons can be issued. If he is in Kuruman even, he only has to wire down and get his interpleader summons issued.

684. If he says the goods do not belong to him they cannot be sold?—Not before the man to whom they belong has had an opportunity of claiming them.

685. *Mr. D. M. Brown.*] You say in all your thirty years' experience it has been on a statement made by the person, with no affidavit of any kind?—Yes.

686. Do you say that is the experience in other Courts?—That is my experience of every Court in which I have practised, which are 14 or 15 in the Colony, including Port Elizabeth.

687. I demur from you in regard to Port Eliza-

beth?—I have taken the trouble to verify my statement, and I have taken out dozens and dozens of writs. I practised in Port Elizabeth for two years, and in the whole of that time I did not make an affidavit for goods which were claimed. Mr. W. B. Shaw. Nov. 10, 1909.

688. How long ago is that; is it not more than twenty years ago?—Perhaps.

689. Do you know the case of Reid. Reid put in a letter claiming the goods. In face of that letter the goods were sold, and I think he went to appeal, or at any rate he took Counsel's opinion. Subject to my memory being correct, he took it to a Superior Court, and that Superior Court held that the letter was not a process of the Court, and ought to have been in the form of an affidavit?—I should be inclined, with due deference, to say that your memory is defective; I do not think any Superior Court ever decided that. According to the Act there is no necessity for an affidavit, and you have to put a 3s. stamp on an affidavit, which you are not allowed for.

690. *Chairman.*] Does not the Act provide for an affidavit?—No. You may remember the case of Simpkins, of Queenstown, where the Messenger of the Court attached some cattle. The man on the farm told him the cattle were his, and not liable to attachment, but Simpkins attached that property and it was sold. The Messenger was sued in the Magistrate's Court at Queenstown for damages, and damages were given against him, and the Supreme Court, on appeal, held that the verbal notice made by the man on the farm to the Messenger was quite sufficient notice and he ought to have reported it to the magistrate, and because he had not done so he was liable for damages and he must pay them. Then I also take the case of Cholwick *vs.* Penny, where it was held that an application for an interpleader suit is an admission by the applicant that the writ is a valid one, and that a verbal notice was sufficient.

691. Seeing that you have here the experience

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of three members of this Committee in regard to affidavits, do you still say that Mr. Buissinné's evidence was wrong from A to Z?—I do.

692. As to practice?—Yes, and particularly so because Mr. Buissinné has been speaking of Cape Town, although I have never had the pleasure of seeing him in the Magistrate's Court during the last 23 years.

693. *Mr. D. M. Brown.*] I made a suggestion to Mr. Fairbridge, and I make it to you. Would it not be advisable in a case where goods are claimed for it to be remitted to the magistrate where the claimant lives by whom it could best be decided?—It would encumber the record.

694. It does require a new record. Supposing it is a case about cattle, does not the magistrate get a clearer conception of the case by seeing the witnesses rather than the paper answers?—In the case you speak of, you presume all the witnesses on the one side would be in one district. Would the magistrate in the district of Caledon have the right to adjudicate on the evidence of witnesses in Cape Town?

695. I am assuming all the witnesses are in one district. Supposing I was driving a cart and pair of horses, every witness in regard to this might be in Caledon?—The instance you give would be such an exception as would prove the rule. It might occur, but you could not legislate for a single occasion.

696. *Chairman.*] Have you any remarks to make upon sections twelve, thirteen and fourteen?—I think these sections are very necessary, and would not entail any hardship on any one.

697. Your Committee propose to omit the part relating to part-ownership?—Yes.

698. I may tell you that I have received departmentally the opinion of some of the leading magistrates of this country, which will no doubt be laid before the Committee at a later stage, to the effect that these sections are not necessary. Have you any remarks to make on that account?

—I think I may say that with the exception of the two members who form the illustrious minority of the Law Society the whole of the attorneys throughout the country are in favour of them, and I speak from facts. Mr. W. B. Shaw. Nov. 10, 1909.

699. Is not that rather a sweeping statement?—No. I do not know one attorney I have spoken to in Cape Town who is not, and as a member of the Committee I know attorneys throughout the country have been consulted upon these sections twelve, thirteen and fourteen, and there has not been a dissentient voice. If you will permit me to point out, you have at present power to do exactly what is provided for in this section twelve.

700. Why do you provide anew for it?—In this instance we have departed from our usual procedure and studied the interest of the third party. At present if goods are in the hands of a third party, and I have reason to believe that those goods belong to the debtor—as I know in a recent case at Simonstown—I say to the Messenger, "Attach that cart and horse." He perhaps says, "I will do it; I am satisfied," and he attaches them. If he is not satisfied, he says, "I will do it, but you must indemnify me." Under the old Bill you have power to attach goods in the hands of a third party, but to-day you must get a special order. To say that the Messenger is relieved from all responsibility by this clause is exceedingly far fetched—or to say that he is relieved from any responsibility at all.

701. Have you any observations to make on section fifteen?—Yes. This section is not intended to apply, as seems to have been thought, to a man who has been released because he cannot pay his debts. The custom at present is that a decree is granted against a debtor, and that decree is stayed pending payment of so-much per week or month as the case may be. The man fails in his instalments, and he is arrested. He goes up to gaol, and he at once applies to the Magistrate for his release on the ground that he is unable to pay the instal-

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ment, or that he forgot to pay it, and the Magistrate releases him, and suspends the writ. Or he goes to the creditor, perhaps, and makes an arrangement with him to suspend the writ. The creditor says at once, "Well, you have once been in gaol, and if I have to suspend the writ I have to take my chances whether you can be re-arrested or not." Then the man does not pay his instalments, and under the present law he cannot be re-arrested. What does the creditor do? He goes to the man and says, "Very well, you owe me £10. Give me an I.O.U. that you will pay that debt in instalments of so much a month." If the man fails to pay the instalments he is immediately re-sued upon that fresh liability, and if failing to pay is put into gaol. He has to pay the additional costs of being sued and everything of the kind. All this section intends to provide for is that when a man has a decree against him, say, for three weeks and fails to pay his instalment and has been two weeks in gaol, he can only serve another week and he has finished. When a man has been in gaol he cannot be re-imprisoned for the same debt. It is only intended to carry out the order of the magistrate who grants the decree against him.

702. In view of your explanation of this, ought not the words "for any reason whatever" to come out of the section? Those are the words that give it its width, which strikes certain members of this Committee as an objectionable width. Those words would certainly include a release on the ground that he *bona-fide* could not pay the debt?—That is so; and perhaps we might almost say we owe an apology to the Committee for the crude manner in which some of the sections were put before the Committee.

703. I put the point to you, as you are Secretary of the Committee promoting the Bill, ought not the words "for any reason whatever" to be taken out of the clause?—They should be amplified.

704. They should be amplified so as to make

clear the real intention according to your explanation ?—Yes ; that is the intention of the Committee. Mr. W. B. Shaw. Nov. 10, 1909.

705. *Mr. D. M. Brown.*] I understand that before the writ could be put in force you would give notice in the district for the man to appear before the Magistrate, in order to see if he was still unable to pay ?—Certainly not. If the decree has been given against the man that decree is a just and proper one and can be applied anywhere. It is for the man owing the money to apply to the Court to have it rectified if necessary, and not for the creditor to run about after him all over the country. If a decree has been granted against him in Cape Town we must presume that it is a proper Order of Court, and if that man chooses to go away from Cape Town at present you can do nothing with him ; if he goes to Woodstock he can laugh at you. Why should not the Messenger of the Cape Town District step into the Woodstock District and say, " A decree was granted against you on such and such a day ; I arrest you."

706. But a man may have no employment and be forced to go off to look for it ?—Wherever he is in the Colony, he simply has to apply to the Magistrate for a suspension of that writ.

707. Where do you get the authority, under the Rules of Court, that a magistrate in Kuruman can suspend the writ ?—He cannot. A man in Kuruman would simply have to write to the magistrate at Port Elizabeth, or wherever the order was made, say, applying for a suspension of the writ.

708. *Mr. Cronwright-Schreiner.*] The position is this, that the Act at present means that if a man goes across the border you have to begin *de novo* in another Court ?—In the Supreme Court.

709. What you want to do is to give the decree power to run in the other district ?—That is all.

710. *Mr. D. M. Brown*]. Supposing the Committee cannot see its way to go to your length do you think it would be proper, instead of going to the Supreme Court, that the magistrate of the district in which he resides should have the power ?—No, I do not.

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711. Supposing the Committee do not go to the length of granting what you request, will it be sufficient to give the local magistrate the power you give to the Supreme Court?—Certainly not; it is absolutely useless.

712. It would save expense?—I do not think so.

713. You are distinctly of opinion that if a person has to apply for a new writ in another district for civil imprisonment he should not apply to the magistrate, but should go to the Supreme Court?—No. I say it is absolutely unnecessary to apply for a new writ of any kind.

714. But suppose the Committee cannot go to your length, and think some process is necessary, do you not think the process from the Supreme Court should be done away with and left to the magistrate of the district to deal with?—I think I should prefer the Supreme Court.

715. *Chairman*]. Section sixteen is in regard to the question of costs. I want to give you an opportunity of placing your views before the Committee because some of the leading magistrates do not favour that section, and they will give evidence to that effect?—At present it is possible to get costs in the Supreme Court upon a judgment of the Magistrate's Court which you cannot get in the Magistrate's Court itself. Take one instance. A case is heard in the Magistrate's Court, and on appeal the Supreme Court upholds or reverses the decision of the Court below, with costs. Those Supreme Court costs can be recovered in the Magistrate's Court.

716. *Mr. D. M. Brown.*] Under the Magistrate's Court writ?—Under the Magistrate's Court writ in the Magistrate's Court. They can also be recovered in the Supreme Court; and the person taking out the writ in the Supreme Court at greater cost than if he took out his writ in the Magistrate's Court can, on failure to satisfy that writ, sue in the Supreme Court for civil imprisonment and get his costs. This has invariably been done, and this practice was followed as recently as

two or three weeks ago in the case of Thwaite *vs.* Barnett. The whole of these costs of appeal and the costs of the Magistrate's Court, might have been recovered in the Magistrate's Court, and then when Barnett was sued for civil imprisonment no order could have been made against him for costs ; so instead of that they took out an order in the Supreme Court for the Magistrate's Court costs as well. They sued him in the Supreme Court for civil imprisonment, and the decree was given against him with costs, which amounted to £12 odd. Mr. W. B. Shaw. Nov. 10, 1909.

717. *Mr. Cronwright Schreiner.*] Your point is that they can actually get these costs by going to the Supreme Court, and thus causing enhanced costs?—Yes.

718. *Chairman.*] But does not the fact of having to go to the Supreme Court deter many a creditor from following up the case?—No. They prefer to go to the Supreme Court, because they get their costs. A creditor living in Cape Town has a debtor living in Wynberg, and he knows very well that if he follows the case against him as far as civil imprisonment in the Magistrate's Court, he will get no costs, but if he sues him in the Supreme Court straight away he can get his costs of civil imprisonment. I fail to see any reason why a creditor who successfully sues the debtor should have to pay his own expenses, since the law expressly protects the debtor by saying that if it is not proved that he has the means to pay no decree shall be granted against him at all. It is only when the magistrate finds he is in a position to pay, or ought to pay, that he grants a decree against him, and I do not see why costs should not follow.

719. *Mr. D. M. Brown.*] Do they not sometimes give costs?—There is only a right to do that under the section when the magistrate thinks the action of the debtor vexatious. A magistrate gave costs recently because he had told a man to see his creditor and try to make an arrangement, and the man refused to go ; the magistrate held that was vexatious conduct, and gave costs against him.

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720. *Mr. Michau.*] Are you in favour of maintenance being charged to the defendant?—I am, very strongly.

721. *Chairman.*] What have you to say about costs of maintenance whilst under arrest?—I do not see why costs of maintenance are different to any other costs, especially as they are allowed in the Supreme Court. In this particular instance you have to pay the maintenance for a week in advance. A man gets his 7s. and applies to the magistrate at once for his release, and the magistrate releases him, and he asks you to have a drink out of the 7s. he has belonging to you. That happened to me the other day at Wynberg.

722. *Mr. Cronwright-Schreiner.*] That would only apply if the man had the means, so there is no injustice?—Yes. In this particular case the man paid the whole debt as soon as he got the 7s., and then he came up and dangled my 7s. in my face.

723. Of course maintenance would not be recoverable any more than costs if the man could not pay?—Certainly not; it is only the man who is deliberately evading payment who will have to bear the cost.

724. *Mr. D. M. Brown.*] At any rate, whether the Committee go to the length of giving these costs or not, do you think, as a matter of pure justice, that the outlay—such as for stamps—should form costs under all circumstances?—I think all costs.

725. Do you not think it is an act of injustice not to give the creditor the actual stamps and outlay that he has been put to?—I would rather not express an opinion on this, because it seems to me that if a man is entitled to the one thing he is entitled to the other. I consider a man's services are just as valuable as Government stamps; a man's services are worth as much to him as actual cash.

726. He may not employ a lawyer, and may go to Court. Why should he not get his outlays?—I fail to see any discriminating point between the two.

727. *Chairman.*] Have you anything you wish to say generally on section eighteen ?—I think it recommends itself.

728. What about section nineteen ?—You see we are now going to provide for a tenant's goods being attached for rent before the judgment is issued, and the point that struck me about the section more than anything else is that you make provision for the security to be given to the satisfaction of any Justice of the Peace ?—The object of this clause was to do away with the inconvenience which at present exists, which in many instances renders the proceedings absolutely useless, especially in the country districts, where you have two Magistrates at the most who are Justices of the Peace—the Magistrate and an Assistant Magistrate—both of whom are on the Bench and will probably be there all the morning or the whole of the afternoon. Perhaps a man is moving his furniture and you want to get out an order at once, and you find it is next to impossible to do so.

729. Is this a substantial grievance ? Are there many cases where you cannot get hold of the Magistrate or Assistant Magistrate ?—I think there are a great many ; in fact, it was the view of the Committee that it occurred so frequently that this provision was necessary. In country districts they divide the work, civil and criminal. I have been at Wynberg and have been unable to get an order all day. The Magistrate is in the Court all morning until 1 o'clock, and then he perhaps has to go some distance to lunch, so that he will not attend to these things and they have to wait.

730. *Mr. D. M. Brown.*] Would you not be satisfied if the power were extended to some clerk in the Magistrate's office who could do it ?—My Committee would be satisfied with any other person the Select Committee thought fit.

731. *Mr. C. J. Krige.*] Often in the country districts you have three or four municipalities in a district. Many people are perhaps four hours

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from the Magistrate's office, and these people cannot avail themselves of this?—The provision is in order to assist people like that.

732. In any case, no one can be prejudiced, because summons must follow the attachment?—Certainly. That grievance is especially felt in the Malmesbury district at the present time, where sometimes they have to go distances of 30 and 40 miles.

733. *Chairman.*] I suppose your remarks on section twenty will be much the same as in regard to the matter of costs?—Yes.

734. What is the object of the provision in section twenty-two?—It is certainly not a sop to the attorneys; I do not know any law agent who would give them one. The object is to raise the profession, and the Committee are asked to take this section in conjunction with sections twenty-three and twenty-four.

735. If this section is not a sop to the attorneys, what is it?—Its sole object is to do away with the illegitimate practice which is being carried on to-day throughout the country.

736. I can understand that being covered to some extent by clauses twenty-three and twenty-four, but, in order to prevent the illegal practices, you prefer to say that there shall be no more law agents enrolled?—It was said in view of these, and in view of the Act that was introduced by the Law Society themselves two years ago, and it is in conformity with that Act. If clauses twenty-three and twenty-four are to be made law, it will be much easier to do it if section twenty-two is enacted. There would be difficulty in getting through sections twenty-three and twenty-four without twenty-two.

737. Why?—Because there are existing rights belonging to people who are at present agents. But, if we were to ask Parliament to enact clauses twenty-three and twenty-four, and other people were to come in as law agents for the purpose of availing themselves of this privilege, it would be

manifestly unfair, and would be prejudicial to the interests of the two classes. Mr. W. B. Shaw. Nov. 10, 1909.

738. Take some place like Niekerk's Hope; why should the fact of a deserving person being enrolled there operate against these two clauses? The clause puts a stop to the admission of any more law agents in the Colony?—Yes.

739. The reason being that you say any more law agents being enrolled would come in for privileges which it is improper new men should be allowed to get?—Yes.

740. But how will this operate? Take a place where there are no law agents at present. Why should the fact of a deserving person and a suitable person being enrolled as a law agent at Niekerk's Hope, say, operate prejudicially against these other two clauses?—Law agents were a necessity once and they are no longer a necessity. They were admitted under the peculiar circumstances of the country. Since then things have very much changed, and if you are going to allow persons to become law agents and take possession of a district such as that to which you refer—which later on may be a splendid place from a legal point of view, in order to make money—and then allow them to go into partnership with attorneys, the whole of the attorneys will then say, "We will not have anything to do with it." Of two evils you have to choose the least.

741. Do you think it is probable you would have taken quite this view 15 or 20 years ago?—I have never had an exalted opinion of the position of a law agent. I became one by the exigencies of the moment, and not by choice.

742. I have never yet been able to see why, under the present law, a man should not be admitted as a law agent where there is only one attorney. You say law agents are no longer a necessity. Do you mean there are sufficient attorneys?—I think so.

743. But if an attorney will not go to a place

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like Niekerk's Hope?—They will be glad to go anywhere soon; the country will be flooded with them.

744. If they do go then the thing becomes inoperative?—An agent might go as soon as he sees this Bill published.

745. The attorney can go too?—Yes. The position is this, that the attorneys on the Committee, and the attorneys generally, are prepared to deal fairly under existing circumstances with law agents, but they say there must be no more law agents, and we have to give in to the reasonableness of that view.

746. But you say this is not a sop to the attorneys?—It is a sacrifice, perhaps, to enable us to get through the major principles of these clauses.

747. It is a sacrifice made by yourselves?—Yes, in the interest of the law agents generally to get through these clauses.

748. But you sacrifice other people. You and your collaborators are already law agents, and you have nothing to sacrifice, but you are sacrificing the possible interests of future people who may have as much right to become law agents as yourselves; you sacrifice them in order to obtain these benefits for yourselves. Is that the position?—You can scarcely put it in that way.

749. Does it not come to this, that on your own own showing you are sacrificing what are at present the rights of people to become law agents in places where there is only one attorney?—You will be aware there was some proposal to introduce a Bill for making all law agents attorneys under certain circumstances. When that Bill was discussed by a number of our friends and some of the most eminent politicians and lawyers in the country it was put to us generally that the first thing we had to do was to abolish the existence of law agents, because that would stand in the way of such legislation; as long as law agents were recognized, and new law agents were created,

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it would prejudice the position altogether. Then it was also recommended, and unanimously adopted, that the provisions of that Bill should only apply to persons who had been enrolled before there was any talk of the introduction of the Bill. We are adopting those suggestions here.

750. It still seems to me that if, upon your own showing, the country is being flooded with young unemployed attorneys, there is no danger in the existing law; how can there be?—Perhaps some member of the Committee may not have seen it so clearly as yourself.

751. *Mr. Cronwright Schreiner.*] The Law-Agent's Bill you refer to not having been brought in, have you any objection to further enrolment of law agents now under the existing conditions?—No, except that if clauses twenty-three and twenty-four depended upon the carrying of section twenty-two I should certainly carry that section.

752. *Mr. D. M. Brown.*] You know that when a district opens and law agents get enrolled first it is impossible for young attorneys to get in?—Very often it is so. I should like to say something about sections twenty-three and twenty-four. Mr. Buissinne's evidence was, I believe, that he has never known an instance of a man practising illegally. I have known dozens of cases.

753. *Chairman.*] I want you to go into that matter. Are you aware of cases where men have committed the practices which are provided for here?—Yes; I know of many cases.

754. Where?—In Cape Town particularly.

755. You might give us some illustrations?—There are two kinds of cases. There are some men who are enrolled in places like Wynberg, where there were not two attorneys. They come to Cape Town and put in their windows in big letters, "So-and-so, Enrolled law agent," and down at the corner of the window, as though it were the painter's initials, "Wynberg." I say that is a clear infringement of this Act. It leads people to suppose that they are duly authorised agents of

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Cape Town, and are entitled to do law agency business in Cape Town. It is a fraud upon the law agents who are practising here, and it is also an infringement of the rights of the attorneys.

756. If that is so, cannot those men be dealt with under the existing law?—The Incorporated Law Society have a difficulty in dealing with anybody unless he is convicted of a crime.

757. The Incorporated Law Society would not deal with these men, I suppose?—No one else can.

758. Why cannot the Magistrate of the Court deal with them?—There is nothing illegal in it at present; there is nothing illegal in a man holding himself out as a law agent if he is not.

759. If he does that when he is not a law agent surely that is conduct of which the Magistrate of that district can take notice? He is a law agent in Wynberg, and he is representing himself in Cape Town as a law agent entitled to practise here?—Yes.

760. If that is so, do you mean to say that the Magistrate at Wynberg cannot say to this man, "We will inquire into this, and I will strike you off the roll"?—The Magistrate would require distinct evidence that the man had said in so many words, or had written in so many words, "I am entitled to practice in the district of Cape Town as well as Wynberg."

761. Why do you say that?—Because the practice has been brought to the notice of magistrates and they have refused to deal with these men; and it has also been brought to the notice of the Law Society.

762. Take this typical case of the enrolled Wynberg Law Agent who puts up his board in Cape Town. What law agency work does he do in Cape Town?—He makes out contracts—I know you will say that is not necessarily law agency work, because, of course, anyone can do that—and he collects debts. People who give him these debts to recover are under the impression that he can sue on them. They deal with him because

they think he can recover them. If they thought that the man could not practice in Cape Town many people giving him work of that kind would never do so; they would give it to someone who could take the cases into Court himself.

763. Surely the inability of these people to sue on debts must become evident to the people employing them. What do they do then?—They do not find it out, because that man knows he cannot appear in Court himself, and he goes to an attorney practising in town. The attorney takes the case into Court, and the bill of costs and everything else are in the name of the attorney, though the work is done by himself.

764. Do you mean to say that if such conduct is brought to the notice of the Magistrate of the Court in which he is enrolled that will not be taken notice of, because a Magistrate has complete power to inquire into these cases and strike a man off the roll?—I know of letters of demand being sent out by other than an attorney and charged for by the attorney in his account. This came out in a case not long ago in the Supreme Court, and the Court simply said, "We do not quite approve of this."

765. What work is it, specifically, that you can do as an enrolled agent which you cannot do if you are not an enrolled agent?—There is nothing at present that a man can do simply by virtue of his being an enrolled agent except appear in Court, and the same applies to an attorney, except in conveyancing and notarial work.

766. Any one can appear in Court?—For himself.

767. And for any one else too?—No.

768. Cannot I appear for my friend Mr. Krige if I accept no fee from him?—No.

769. Are you sure?—Certain.

770. *Mr. Cronwright Schreiner.*] You are referring to the recent case in which you appeared?—Yes, the case of the Divisional Council. I objected to the Clerk of the Divisional Council appearing, as he was not qualified, and that objection was upheld both there and in the Supreme

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Court, on the ground that he was not an enrolled agent or attorney.

771. That would mean he could not recover costs?—It would mean he could not appear at all, and the case was thrown out? there was no appearance for the Divisional Council. Then this new Rule was passed, authorizing Secretaries of Corporations to appear.

Thursday, 11th November, 1909.

PRESENT:

Mr. C. J. KRIGE (Acting Chairman).

Mr. H. S. van Zyl.	Mr. Macintosh.
Mr. D. M. Brown.	Mr. Oosthuisen.
Mr. Cronwright Schreiner.	Mr. Michau.

Mr. William Bunting Shaw, further examined.

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772. *Acting Chairman.*] I think you were dealing last with Clauses Twenty-two, Twenty-three, and Twenty-four?—Yes. I got as far as the illustrations of persons who were affected by this Bill, being law agents who were enrolled in one district and coming to practise in another district in which they are not enrolled. I want now to pass on to the case of persons who are not enrolled at all.

773. That will be more in connection with section twenty-three?—Yes. At the present time throughout the Colony there is a large number of people who have no legal qualifications of any kind, either as enrolled agents or otherwise, who are doing what I consider is legal work—drawing contracts of service, contracts of work and different powers of attorney, and so on—and who are charging for these things and being paid for them. Now, that is in direct violation to the spirit of the law. It is an infringement of a right, and it is an

offence which is very severely punished by the law of England. These men, in addition to doing this kind of work, are taking other work which it is necessary for them to get done through a qualified practitioner of some kind or another, either an agent or an attorney, and in most instances I am sorry to say it is an attorney. They take this work to the attorney, and they receive half fees from him, so that they are practically enabled to carry on the work of an attorney themselves. I had a letter the other day from a gentleman in one of the country districts—I do not wish to mention his name, because it would be invidious—and he tells me that the man who is doing most of the legal business in that district to-day—it is not far from Cape Town—is a man who is not an enrolled agent nor an attorney, but simply a tout. He goes through the district and does work of the kind I have mentioned, and what work he cannot do he sends to an attorney in Cape Town, and gets allowed half fees for it. The attorney in the district wrote to me and said it was a great disgrace, and a great grievance there.

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774. This grievance is not confined to men such as you mentioned yesterday, who are, perhaps, admitted elsewhere?—No; these are men with no qualifications whatever. Now, in Cape Town, there is a very large number of men who are holding themselves out as general agents, and who are collecting debts, making contracts, drawing powers of attorney and drawing wills, and charging for this work, and if these men get any work which necessitates going into Court they go to the attorneys and get half fees allowed them. I can mention attorneys in Cape Town to-day who are taking such work as the passing of an anti-nuptial contract for 10s. 6d. and the stamps, and are actually allowing men who are neither enrolled agents nor attorneys 5s. 3d. out of the 10s. 6d. to do it. These are not isolated cases. There are numbers of attorneys

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and agents—I am not exonerating one or blaming one more than the other—who are actually in partnership with persons who are unqualified. There are touts going about canvassing for work and taking it to attorneys and agents, and getting an allowance for the work they put in their way, or even in a criminal case they may bring to them. Then there are so-called tradesmen's protection associations, and the Drummond Association, as it is better known. Collecting is done and agency work of all kinds is carried on by these associations and charges are made; and when a case has to go into Court they simply hand it over to an attorney who allows them half fees. They are practising as attorneys, and they are getting more money out of it than the attorneys, and doing practically all the work of attorneys, because the attorney advances the disbursements and loses his interest on that money, and pays his office rent and finds the stationery. Then there are some associations of the kind—very questionable associations—which are composed of men who are collecting debts in this way, and entering into an arrangement with attorneys by which the attorneys do all the work for practically nothing; that is to say, an attorney takes a case into Court, and if fees are not recovered from the opposite side no fees are charged. Then there is the system of a man paying 2s. 6d. subscription per month towards such an association, and getting all his advice for nothing and his work done upon this basis, which is practically a partnership basis. Cape Town to-day is honeycombed with things of this kind, and it is not confined to Cape Town but is right throughout the Colony. The worst feature of the case, however, is to be found in Cape Town at the present time.

775. How does this prejudicially affect the public interests?—I am not looking at it so much from the point of view of the public as from the professional man's standpoint, as he has a right to be protected, in the same way that medical men are protected.

776. *Mr. Macintosh.*] Surely medical men are protected for the protection of the public?—So these men should be protected for the protection of the public. Mr. W. B. Shaw. Nov. 11, 1909.

777. When the Acting Chairman put a question to you as to whether it affected the public your answer was that you did not see it had any particular effect on the public?—I did not say that; I said I was looking at it from the point of view of the practitioner.

778. Will you look at it from the point of view of the public?—I say it is in the public interest that only qualified men should do legal work.

779. Is collecting work legal work?—It is legal work, and inseparably connected with it.

780. Should not an unqualified man be able to collect debts?—No.

781. How about a firm having a regular collector in their employ?—That would be all right, but in the interests of the public outside men should not be allowed to do such work.

782. Suppose three men who had not sufficient work combined to employ one collector?—They should have a fully qualified man.

783. He may be qualified to collect debts?—He may be smart, but they have not that control over him that you would have over a qualified man.

784. *Acting Chairman.*] He cannot be punished in his status?—He cannot be punished in his status. I would like to add that from what I have said it will be obvious that section twenty-four is not framed so much for the purpose of creating partnerships as for preventing derogatory partnerships; the object of this Bill is to prevent these partnerships. There are attorneys on our own Committee and there are attorneys in Cape Town to-day who say, "We have to make allowances. It is against our grain, and we wish we had not to do it; we abhor the thing, and think it is most unprofessional, but the Law Society will not stop it, nor anyone else, and we have to do it in our own protection." Section twenty-four particularly aims at preventing these illegal partnerships.

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785. *Mr. Oosthuisen.*] You say an agent from Simonstown put up a plate here and tried to practice here. Cannot he get enrolled here?—No; he cannot be enrolled in Cape Town at present. At present a person can only be enrolled as an agent at any place where there are not two attorneys practising. There are more than two attorneys in Cape Town and in Wynberg.

786. *Acting Chairman.*] Mr. Buissinné's evidence on Clause Twenty-four was that, by inference, you would legalise partnerships between law agents and attorneys, which he says the Law Society has so far put its face against?—That was quite a secondary consideration in the minds of the Committee when this clause was framed. The main object of this was to do away with the illegal and abominable partnerships which are in existence to-day between attorneys and unqualified persons. I say there are hundreds of these partnerships being carried on to-day, and I cannot see any justification by calling them *del credere* allowances.

787. *Mr. H. S. van Zyl.*] You do not object to a partnership between a qualified attorney and a qualified law agent?—No, but what I do object to is the partnership which is really a partnership by the allowance of fees to all sorts of persons indiscriminately, and that is what is being done to-day. If an attorney says, "Bring all your work to me and I will give you half fees," that is a partnership, whatever you may call it.

788. *Acting Chairman.*] Do I understand you are prepared to meet the Law Society in this respect, and as long as you are met in regard to the qualified practitioner and the unprofessional man, and get that partnership knocked on the head, you will be satisfied? You do not want to make a partnership between attorney and law agent?—The object was to do away with these illegal partnerships. For the last 30 years I have been giving work to some of the leading attorneys in Cape Town, and I have received half fees for

those cases I have put into their hands. I have received my half share from some of the leading attorneys for years, and sometimes my account has run to £200 and £300 per month. I considered that I was a sort of partner ; I prided myself that I was, at any rate.

789. *H. S. van Zyl.*] You have no objection to that ?—No ; I have no objection to that.

790. But what you object to is the case which I think is common in the country of a man who practises as an agent but who is not duly qualified, and who transfers estate work to an attorney in Cape Town, and the Cape Town attorney makes him an allowance ?—That is what I object to. I have just mentioned instances where it is done regularly.

791. *Mr. Macintosh.*] Do you apply this also to conveyancing ?—No ; I would not.

792. You do not look upon conveyancing as professional work ?—Certainly I do. No one can do conveyancing work except a man who is admitted by law.

793. But you know, surely, that big trust companies, for instance, prepare all these conveyancing deeds, and the conveyancer does the actual passing only, and he allows a certain amount to the trust companies ?—That is one of the things I strongly object too. I think those trust companies should pay the same fees as the attorneys if they share in the attorney's fees for the attorney's work, as those fees are part of the legitimate revenue of the Government. An attorney wrote me from Graaff-Reinet the other day, and said that if the companies there were allowed to go on as they were doing there would be very little work left for the attorney, and I say such a state of things is not fair for the attorneys.

794. You do not think of the public in that connection ?—I do think of the public, and my experience is that the lower the qualification of the men doing the work the higher the public has to pay for it, and I say that without hesitation.

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795. Are you speaking as between law agents and attorneys?—I am speaking both with reference to law agents and attorneys and the public.

796. Are you making a comparison between law agents and attorneys?—No.

797. You say the lower the qualification the higher the cost?—I do not mean the legal qualification, but the qualification as an individual. That has been my invariable experience. I may mention this as a fact that it is within my knowledge that men in the country districts who are not qualified at all draw up schedules. They get seven guineas for that work; they send them to an attorney in Cape Town, and the attorney gets his legal fees and allows half fees. In many instances the attorney has to draw up the documents again, and send them back for signature. Section twenty-three certainly aims at every one who is not qualified to do any legal work; I do not care if what is provided there is done by a person or a company.

798. *Mr. H. S. van Zyl.*] Supposing a man in the country who does agency work gets in an estate and sends it to an attorney in Cape Town, or gets a transfer passed for a farmer in the country, which he cannot do himself and gets done by an attorney in Cape Town, the attorney making him some allowance, is he got at by this section?—Yes, if he represents that he can do the work himself, unless he says in a straightforward way, "I am not an attorney, but I have an attorney in Cape Town who will do this."

799. *Mr. D. M. Brown.*] Trust companies do that?—Trust companies do far more than that; they take powers of attorney from these people and use them.

800. You know at the present time there are firms of debt collectors running who depend upon the allowances they get for their existence?—Then they ought to perish.

801. Do you know of such a thing?—I do, unfortunately.

802. This Bill does not deal with conveyancers?—It does not touch them.

803. In regard to any person holding himself out to be a legally qualified practitioner, so far as any question of preference is concerned you are not interested in that ; you simply want to perfect the Magistrate's Court Bill as far as practicable ; that is the purpose here ?—That is all I want.

804. You say you do not care if there is a partnership between an attorney and a law agent ; you do not want to restrict the law at present which allows such partnerships ?—I do not want to stop anyone from entering into a partnership which I enter into myself.

805. You know there are such partnerships ?—I know at present there are hundreds of them, although they are not called such.

806. You wish present rights maintained ?—They will be maintained, of course.

807. *Acting Chairman.*] On Clause Twenty-Five, I believe there is a good deal of opposition to it raised by the Law Society ?—I have read Mr. Buissinné's evidence on this point, and I am surprised at the interest he has taken in trying to prevent agents getting rights in this manner. I think it is a thing which the agents may very fairly ask to be made law.

808. The objection they raise is in this light, that they say if this becomes law then, as the clause stands, the Supreme Court may hold that the onus of looking after the law agents' conduct will be thrown upon the Law Society, and they cannot undertake that burden ?—Of course the Law Society was originally asked to undertake such cases, and the Law Agents' Association was prepared to assist them. The Law Society was asked to do it as being what we thought the proper body to do it, but they refused. They said they had not the funds ; so few members of the profession would contribute to their funds and belong to them, and consequently they could not undertake the work. Then the amended clause was put in, as is now before the Committee, leaving it for the Magistrate to make the inquiry

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and send the evidence to the Attorney-General, who should then, if satisfied, refer it to the Registrar of the Supreme Court, for the case to be set down by him and tried in exactly the same way as the case of an attorney.

809. You speak of the amendment which has subsequently been suggested?—Yes. Mr. Buissinné says if this section is passed he does not see how a Magistrate will be able to exercise control over a lot of belligerent agents coming before him in Court, which is absurd. There is a section providing for contempt of Court. This section is not intended to apply to that, but a section in the Act provides for contempt of Court, by which a man—whether he be an agent or a member of the public—can be dealt with. If agents or attorneys want to take off their coats in Court there is that section which deals with it. This section is simply intended to secure to law agents the fairest and the highest tribunal in matters that affect their life and their profession, and their whole career, exactly the same as attorneys, and not only attorneys but also other people. A Magistrate may strike an agent off the roll and that man is ruined for life,

810. The papers have to go to the Court?—The Court confirms them simply in the same way as to-day when a Magistrate imposes a punishment above a certain limit, it has to go to the Judges for review; the papers are sent in the same way to a Judge for review.

811. The law agent can be heard if he wishes?—At present he cannot be heard. If he wishes he can appeal on the evidence and the finding of the Magistrate, and the Court says, "This is a question of fact and the Magistrate has found that, and I cannot interfere." I want the person passing sentence to be the Supreme Court Judge. If a Magistrate is not allowed to settle any judgment upon a case where the punishment exceeds a certain limit, unless the Attorney-General thinks it ought to be remitted to him, surely it is not

right for the Magistrate to have supreme power over a professional man whose whole career in life is in his hands. I say this is the fairest request that could possibly be made on the part of agents, and even if it does entail a little extra trouble that is nothing worth considering.

812. *Mr. D. M. Brown.*] How often does it happen?—I have not known half-a-dozen cases in my experience.

813. *Mr. H. S. van Zyl.*] The agent is really an officer of the Magistrate's Court, and it does seem right that the Magistrate, in the first instance, should have jurisdiction over him?—The Magistrate has no power over an attorney of the Supreme Court, who does exactly what an agent does.

814. You could not get at the attorney because he is an agent of the Supreme Court?—If the issues are so great surely there can be no objection to the very highest tribunal deciding the case.

815. You think it would be fairer to the agent?—Yes. I would also add that it would be fairer to the Magistrate. I may say I have been told by Magistrates themselves that they have hesitated to put the law in motion because of the invidious and unpleasant position in which they would be placed by doing it, and where the thing is so near the border line Magistrates will not interfere, very largely because of that position.

816. Is not that still the position, because the Magistrate still has to set the law in motion?—He still has to set the law in motion, but he has not to decide the case.

817. It depends very much on how he runs the case as to what the result will be. The whole thing is in his hands, and he has to secure the attendance of witnesses?—Exactly the same as at a preparatory examination, and at the trial the man can call fresh witnesses. The agent can do the same before the Judge, and the witnesses will have to give their evidence.

818. When the case comes before the Supreme

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Court you do not want it to be on the evidence taken by the Magistrate, but you want the man to be tried on the evidence to be given?—Yes, that is what we want.

819. *Mr. Michau.*] The Magistrate merely holds an inquiry and he sends the evidence to the Superior Court through the Attorney-General?—Yes; he sends the evidence to the Attorney-General, and if he thinks it is a proper case he sends it to the Registrar of the Supreme Court, who issues the process, and the party is called before the Court.

820. I think you have told us in all your experience you have only known of half-a-dozen cases?—About half-a-dozen cases, speaking roughly.

821. I must say I have had 25 years experience, and I do not know that I have ever heard of any hardship?—I do not say half-a-dozen cases of hardship, but half-a-dozen cases where agents have been dealt with.

822. *Mr. H. S. van Zyl.*] You know if the Law Society brings a case against an attorney and loses the case, the Court often gives costs against the Law Society?—Yes.

823. What would happen here? Supposing the Attorney-General institutes proceedings upon the evidence taken by the Magistrate and the Supreme Court gives judgment in favour of the agent, how will you make provisions for costs?—I would let it be a quasi-criminal matter. If there was malice on the part of any one, the agent exonerating himself would have the right to sue for damages.

824. You would not wish costs to be given against the Attorney-General if the case goes against him?—In no case.

825. You are in favour of having a provision inserted that in no case shall costs be awarded against the Attorney General?—Certainly.

826. *Mr. D. M. Brown.*] You have had a very large experience?—Yes.

827. Taking your experience here, there are more attorneys appearing in Court now than agents?—

In Cape Town I think there are more attorneys than agents. Mr. W. B. Shaw. Nov. 11, 1909

828. The Magistrate has no power whatever over an attorney?—I have already said so.

829. Have you found that the order of the Court has in any way been interfered with, as suggested by Mr. Buissinné, through the lack of that power? —I have never known of the necessity of that practitioner being dealt with by Rule of Court.

830. Have you ever seen it necessary for the Magistrate to do anything towards keeping order in his Court?—I have never known of a Magistrate having any difficuly in keeping order in his Court.

831. You would emphatically say that Mr. Buissinné is wrong in the opinion he has formed from his experience?—From A to Z.

832. *Acting Chairman.*] I believe you have an amendment in regard to Clause Twenty-six. Do you not think the clause itself would serve the purpose better than the amendment? I believe both Mr. Buissinné and Mr. Fairbridge thought that the clause as it stood was preferable to the amendment? —No; I think the existing clause is absolutely inoperative at present.

833. I speak of the clause as framed in the Bill. They prefer that to the amending clause. This leaves it to the discretion of the Judges to frame a new tariff, and I believe you have an amendment to it?—I think the object of this clause has been entirely misapprehended. I think Mr. Buissinné said he could only conceive the promotors of this Bill were talking about the new tariff, because they were not satisfied with the 7s. 6d. and the 10s. 6d. A more absurd statement could never be conceived. It does not apply to this at all. There are several new provisions in this Bill for new work to be done. The object of this new tariff is to enable the Judges to make a tariff for that new work, which is absolutely necessary. If there were no new tariff made and allowed that work would have to be done for nothing, and that is not the object of anybody— I am sure not even of Mr. Buissinné.

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834. If you entrust it to the Judges, who I believe are, as a rule, very chary in increasing expenditure in the way of lawyers' fees, will it not be best to leave the clause as it stands in the Bill?—It seems to me the object is the same in both instances.

835. *Mr. H. S. van Zyl.*] Can you give me an instance at the present time where costs which have been reasonably incurred in and about the defending of a man have been disallowed?—Yes; a case was decided in the Supreme Court the other day. The Magistrate refused to allow costs to a man going into Court because he refused to take the offer of instalments.

836. What did the Supreme Court hold?—The Divisional Court held, first of all, that the Magistrate was perfectly right, and the Appeal Court held that both the Magistrate and the Judge in the other Court were perfectly wrong.

837. What does that prove—that parties to-day are protected where costs have been reasonably incurred?—Yes, but the question of whether they have been reasonably incurred is such a wide one that it must be referred to in some such manner as this, so as to ensure people getting the costs.

838. Even here it is rather generally stated. In what way do you make it more definite? How do you improve it, so that it will not be open for the same thing happening as at the present time?—Because this provides that there shall be a charge made for the work which may now or in the future be done, The amendment reads, "...in the absence of such provision in respect of any fee or disbursement, the Clerk of the said Court shall allow such sum as shall appear to him reasonable and not prohibited by any rule of Court." At present, as you are aware, under the rule of Court which is in existence it is necessary to get an Order of Court before you can get any additional costs, and at the end of the case you have to make application to the Magistrate that you are to be paid for travelling expenses and drawing plans.

and any necessary work. What we want is that is that the Clerk of the Court shall allow that, subject to review by the Magistrate. Mr. W. B. Shaw. Nov. 11, 1909.

839. I am referring to the first part of the amended clause, "the party, whether plaintiff or defendant, in whose favour any judgment of any Court of Resident Magistrate in any civil action or proceedings shall be pronounced, shall be allowed in the taxation of costs against the opposite party such fees and disbursements of the agent or attorney of the successful party as may have been reasonably incurred in and about the prosecution or defending of the action or proceeding and on the scale provided by the tariff of charges which may now or in future be framed. . ." Is not that the case to-day?—There is to be a future tariff framed.

840. But if there is that framed. You do not say there must be, but there may be?—Yes.

841. But have you not got all of that at the present time which is included in the first part of the amendment? In what respect is it not the law to-day?—This section was framed, as far as my memory serves me—I must confess I am not very clear upon it—with particular reference to the tariff which must be framed in future. The object of the first part of this section was that it would be necessary to get a tariff for some of the work which is provided for in the Bill and for which it was rendered obviously necessary that a tariff should be framed.

842. *Mr. Michau.*] You can get that done under Clause Twenty-six of the Bill as drawn?—I think the Committee would be prepared to accept the suggestion of the Select Committee that the Clause is better than the amendment.

843. *Mr. H. S. van Zyl.*] You prefer the old clause?—I am personally prepared to accept the old clause. I do not wish to bind any other member of my Committee on that point.

844. *Acting Chairman.*] What is the object of Clause Twenty-seven increasing Counsels' fees?—To cheapen litigation.

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845. Will you kindly explain how?—There is nothing in this Bill which will tend to cheapen litigation more than this question of increasing the fee of Counsel, in this way, that at present you have a case in the Magistrate's Court, and Counsel is only allowed a guinea. Counsel, very properly, will not come into the Magistrate's Court for a guinea, and the client, except in very extreme cases, is prepared to pay the additional charge which the Counsel very properly makes for his attendance. You might get junior Counsel to appear in the Magistrate's Court for three guineas, and that would be a charge as between party and party. What would be the result? You could go to your Counsel after the case is decided and say, "What do you think of the judgment?" He would say, "I think you ought to appeal," or "I do not think you ought to appeal." If he said he did not think you ought to appeal the matter would be at an end. You would thus get the best assistance at the outset and get your opinion, which usually costs three or five guineas, for nothing. It costs more in the first place to get Counsel in Court, but you save an expenditure of seven to ten guineas for the opinion.

846. *Mr. H. S. van Zyl.*] If a client wants Counsel to appear for him in the Magistrate's Court, is it fair that his opponent, who may be a poor man, should pay?—It is in his interests in the long run.

847. It may not be. Do you think it is likely you will get many Counsel to come into the Magistrate's Court for three guineas? You know the lowest fee in a trial case in the Supreme Court is five guineas, and when Counsel go out of their ordinary Court into the Magistrate's Court it is really a rule of the profession that the fee should be increased?—I think you would get a number of Counsel to take the three guinea fee.

848. *Acting Chairman.*] Have you anything to say with regard to Clause Twenty-eight?—No.

849. And Clause Twenty-nine?—I can only say that, from my experience, this is a very necessary clause. Mr. W. B. Shaw. Nov. 11, 1909.

850. It only applies to criminal cases?—Yes.

851. Very strong exception is taken to Clause Thirty. Have you anything to say in defence of that clause?—I think it is a very necessary clause. I have no sympathy with criminals when they are criminals, and therefore I agree with Mr. Buissinné, but I have a very great objection to people being called criminals until they are convicted; I think that is monstrous. In this instance I think every man ought to have the right of trial by jury.

852. *Mr. Cronwright-Schreiner.*] Will not that cast enormous work upon the Circuit Courts and other Courts, and will it not increase the Supreme Court work enormously?—It would be less expense to give a person trial by jury than to adopt the alternative which I see has been suggested to appoint specially qualified men, such as Clerks of the Peace, to conduct the prosecutions in the Magistrate's Courts.

853. *Mr. H. S. van Zyl.*] What proportion of the cases do you think will be tried before the Magistrate?—A large proportion of them.

854. Do you think so?—I do.

855. Do you not think the large majority will prefer being tried before a jury, especially those who really are guilty and will have to be found so?—I do not think so for a minute. There may be instances of that kind, but I do not think it will be the rule; my experience is to the contrary.

856. Has not your experience been that it is more easy for a man to get off before a jury than before a Magistrate?—When he is innocent, yes. When a man is innocent it is far easier for him to get off before a jury than before the Magistrate, who is unconsciously interested and prejudiced in the case.

857. Do you not think it is desirable that you should have better qualified people in the Magis-

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trates' Courts to conduct these prosecutions?—If these clauses were adopted, I think the practice we have at present in vogue of all records being subject to the review of the Judges, and also all papers being sent to the Attorney-General, would meet the requirements.

858. Supposing this section did not become law, would you not be in favour of having better qualified men to conduct prosecutions in the Magistrates' Courts?—I should prefer to continue the present bad system until it has forced itself upon the attention of the public, and we can get the provisions of this clause carried.

859. *Mr. Cronwright Schreiner.*] Would it not be better if the Chief Constable, in a country district say, prepared the case and handed it over to some legal practitioner to conduct, because the present system is so unsatisfactory?—It might be some improvement, but I do not think very much, because the same Magistrate would actually try the case who had practically decided it in his own mind by committing.

860. I mean before the case is tried. At present the Chief Constable prepares a case and conducts it before the Magistrate, who is his official chief?—Yes.

861. Would it not be better if there were a man appointed by Government to take the case from the Chief Constable and conduct the prosecution?—The expense would be enormous.

862. Apart from that it would be a better plan?—Yes, but I am afraid the expense would be too great.

863. *Mr. Oosthuisen.*] If a man is brought up for stealing a goat, can he ask to be tried before a jury?—Yes, because the penalty for cattle-stealing is very heavy.

864. *Mr. D. M. Brown.*] Do you make it absolutely the person's choice?—Yes.

865. Supposing a man was brought up for twenty cases of housebreaking, would it not be better that he should not have this choice of being tried

by the Resident Magistrate? Should it not read that a man would only have the choice of being tried before a jury. Under this clause if a man is brought up for a most serious case he can demand to be sent back to the Magistrate; as the clause reads now he has the absolute choice?—It is provided for in the amendment that the Magistrate can only try the case if it is in his jurisdiction. Of course a Magistrate has jurisdiction in a case of house-breaking.

866. If a man had twenty charges against him he could choose to go back to the Magistrate, and the Magistrate could only give him twelve months?—Cannot he be given twelve months for each offence?

867. It has been held that he cannot?—That is where crimes arise out of the same thing?

868. No; he cannot do it. This clause would be absurd as it stands. What you mean is that a man should get the benefit of being tried before a judge and jury if he wished?—Yes. I may say this section is the decision of the Committee, but personally, as an individual, I should be quite satisfied if provision were made, as an experiment, that the person should have the right of stating whether he wished to be tried by a judge and jury or the magistrate, leaving it for the Attorney-General to give effect to that wish in accordance with what he deemed to be justice.

869. Do you think the present practice of sending a case back to the same magistrate to try who took the affidavits and instituted the proceedings and held the preparatory examination is conducive to the true administration of justice?—It is rather a difficult question to answer. In principle I should say it is bad, but in practice I should not say it is a failure, I should like to guard myself against any suggestion I have made which gives the idea of magistrates abusing the powers that are conferred upon them, but I think in principle it is bad.

870. I heard a magistrate once say to a person,

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"The Solicitor-General must have thought you were guilty or he would not have sent you back for trial?"—That was a universal feeling amongst magistrates twenty years ago. The same principle would apply if the case were sent to another magistrate.

871. You have heard that remark made?—Yes. many years ago.

872. Do you not think there should be something added to the instructions from the Attorney-General's Office, to the effect that the remitting of the case does not in any way imply a verdict, but only that there is a *prima facie* case to be tried?—I think that has recently been done, and that idea has been very largely dissipated.

873. *Mr. H. S. van Zyl.*] You could not very well have provision in the Bill that the same Magistrate should not try the case; that would not work?—No.

874. *Acting Chairman.*] I believe that sections thirty-one and thirty-two can be taken together?—Yes.

875. I think I am correct in saying that the witnesses who have so far given evidence are not against the principle of these two clauses, provided both clauses are amended to the effect that there must be good reason given to the Court for these interrogatories. Have you any objection to amending the clauses in that way?—I think that is provided for in the clause by the words: "It shall be lawful for any Court of Resident Magistrate upon the application of either party to a suit or whenever such Court shall deem it necessary."

876. Mr. Buissinné and Mr. Fairbridge said there should be a qualification that the Court should be satisfied of good reasons?—The Court would not deem it necessary unless it were satisfied that there were good reasons.

877. You have no objection, if it can be amplified, to that being done?—If it can be amplified. Of course, there has been a good deal of objection raised to this taking of evidence of people who cannot appear in Court.

878. *Mr. Cronwright Schreiner.*] There is no objection if you give the Resident Magistrate discretionary power?—That is the object. Nothing in this Act would give arbitrary power to call a witness who did not like to appear in Court. Mr. W. B. Shaw. Nov. 11, 190

879. *Mr. H. S. van Zyl.*] You are satisfied if it is amended to leave it to the discretion of the Magistrate?—Yes, but I do not think such an amendment is necessary.

880. *Acting Chairman.*] Have you anything to say about Clause Thirty-three?—It is a clause which epecially recommends itself to the good opinion of the Legislature on the ground of the saving of expenditure. Mr. Buissinné thought it would add to the expense, but if he had taken the trouble to take the present tariff and work out the cost of bringing witnesses from a distance, and paying those witnesses their allowance and travelling expenses, when they came, as he said, from one corner of the district to another, and then considered the expense of holding this Commission, he would have found that holding the Commission was cheaper than having the witnesses; five minutes calculation would have convinced him of that. Mr. Fairbridge supported the clause.

881. *Mr. H. S. van Zyl.*] You do not interfere with the present law; it is merely an alternative procedure?—Yes, to save expense.

882. *Acting Chairman.*] You are a practitioner of vast experience, and before we leave this Bill, I should like you to tell the Committee whether, in the event of this becoming law, it would tend to increase the cost of litigation in the Resident Magistrates' Courts or otherwise?—The only result of this Bill in that respect would be that it would decrease the cost of litigation in every single respect. In not one single respect is provision made in this Bill which would not tend to decrease the cost of litigation. I do not mean decreased cost of litigation, inasmuch as by the reducing of the jurisdiction and cheaper law being got in the Magistrate's Court

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instead of the Supreme Court, but in reference to the conduct of cases in the Resident Magistrates' Courts the only effect would be the decrease of the cost of litigation.

883. *Mr. H. S. van Zyl.*] In the Magistrate's Court itself?—In the Magistrate's Court itself.

884. Will you explain in what way?—Take this very next clause in the Schedule, about which Mr. Buissinné had a great deal to say in regard to the cost of going to Court and filing of pleas. I have known cases in which seven, eight or more witnesses have been called in a case in which it was necessary to prove the sale of goods. The defendant goes to Court and gets up and disputes the claim, which is simply for goods sold and delivered. He gets up and says he wants it proved that there was a sale—that there was a contract, and that there was delivery, and also the price which was agreed upon. The consequence is that sometimes eight or nine witnesses have to be called to prove a simple case of this kind. It comes to this, that you have to bring several witnesses from a store to prove the delivery, and several salesmen who made the sale, and so on. If you have had pleadings a man will be bound to say, "I have an account for goods sold and delivered from January to June. I deny that on the 15th June I received a parcel of goods," and then that is the only thing you will have to prove. There is a saving in expense there.

885. *Mr. D. M. Brown.*] You would not have to prove delivery?—A man would be bound to say, "I admit all the rest." On the question of filing the plea as provided here, at present if you go into Court and a case is disputed—I am talking of large towns like Port Elizabeth and Cape Town—and a man enters appearance to defend the case, the Court then appoints a day on which the case is to be heard. Both parties come on that day with their witnesses. Say it is a case of contract. The defendant comes into Court and denies the contract, and sets up a counter claim

for slander or something or other. The evidence is heard on the contract, then the evidence is taken to prove the counter claim, and then the case is postponed for another week or fortnight, as the case may be, for the plaintiff to call rebutting evidence on the counter claim. The postponement and the amount of costs incurred in reference to witnesses in cases of this kind are something enormous. The whole of this would be saved if, on the day the case was called, the magistrate fixed a day for hearing and then a plea had to be filed. You would then come into Court on the day appointed, with one or two necessary witnesses on the particular point raised in the plea; and not only with reference to the number of days, but with reference to the number of witnesses to be called, the expense of litigation in the Magistrate's Court would be reduced, I can safely say, one half in a case of that kind. You should not in the Magistrate's Court be able to file elaborate pleas, and it would not be necessary in many instances. A man gets a summons, and on the return day of the summons no plea has been filed, and you come into Court. In such a case the defendant would not be allowed to put in a special plea, and in fact judgment would go against him by default. But if you do not come into Court when you have the plea filed, you still have to go to the Court to get the magistrate to fix a day. Suppose a plaintiff goes and fixes a day himself, as in the Supreme Court. In the Supreme Court if a man gets a summons the defendant can keep the case over the whole of that term, and the plaintiff can do the same.

886. *Mr. H. S. van Zyl.*] Once a case is set down in the Supreme Court it is down for that day?—But look at the time that has to be allowed, and that is because in many cases the parties come from long distances. But in this Court how simple it would be. The magistrate fixes a day, as he does at present. He asks, "What day shall we fix for this case?" One side suggests "Thursday, the

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22nd." He asks, "Will that suit you?" and the other side say, "No: I cannot get my witnesses in time." He inquires, "When will it suit you?" and on being told "the 27th," he fixes that day. There is no difficulty about it; the earliest possible day is fixed when the witnesses can be there.

887. That is for the big towns, but take a place like Clanwilliam, where the defendant is summoned to appear in Court on Thursday, and he comes a day's journey and brings all his witnesses, and when he gets there he is ordered to file a plea, to give the other side a chance of answering the plea, the case being postponed and he and his witnesses having to return?—But if it was the law that he should file a plea he would not bring the witnesses. For instance, you can put a note at the bottom of the summons to tell him this. Besides that, when a man gets a summons he goes to his agent or attorney, who fixes a day for him and lets him know. To-day the parties to the action never appear in Court on the first day.

888. You mean, even as the law stands to-day, if the defendant in Clanwilliam raises a special defence in Court the Court will grant a postponement?—Yes. When a defendant sets up a special defence for the first time in Court, and you have to rebut that, it is necessary to postpone the case, and it is done. The provision in this Bill would save expense in every way compared with the present practice, both in the town and the country. It would only be necessary for the agent to appear, or for him to appear himself, and the magistrate would fix a day when the whole case would have to be heard without fear of further postponement, and meanwhile you would have to define what you were coming about, so that there would be no necessity for further delay, especially if there were increased jurisdiction.

889. That is one way in which you think costs would be decreased in the Magistrate's Courts. Is there any other way?—That practically covers the whole procedure, and there is no further alteration

affecting costs in the Bill as far as I remember. The whole procedure would be governed by that. Mr. W. B. Shaw. Nov. 11, 1909.

890. We are only on matters in the Magistrate's Court itself?—Yes. Generally, in the Magistrate's Court itself, the tendency would be to reduce the cost of litigation.

891. Even in spite of the three guineas to Counsel?—Yes, because, as I explained to you, you would save the cost of appeals and Counsel's opinions.

892. *Acting Chairman.*] Have you anything to say about Clause Seven of the schedule, as amended?—Here is another instance where there would be saving of costs; this was put in for that purpose. At the present time a magistrate does not give the reasons for his judgment until he sends the record to the Registrar of the Supreme Court, which is after the fourteen days has expired. Now, very often you would be induced to withdraw an appeal if you knew the magistrate's reasons. All that we want at present is to put our clients in the best possible position, so as to save them expense. I have known many instances where we have gone to Counsel for opinion, and he has said, "Well, of course, if you had not these reasons before you I should advise you to appeal, but the magistrate has based his decision on the facts which he believes, and it would be useless appealing against that." By that time heavy costs have been incurred.

893. *Mr. D. M. Brown.*] The moment the magistrate bases his judgment on the finding of facts it is no use appealing?—Just so.

894. In remitted cases do you think it would be an advantage to endeavour to combine the jury system and the present system of the magistrate, by having two Justices of the Peace, of not less than 40 years of age and with five years experience, who must not be officers of the Government, to sit with the Magistrate?—I think it would be a very good plan to adopt, the same as with the Petty Sessions in England.

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895. You would have these Justices of the Peace nominated by the Government, or the same as the Licensing Court, so that the magistrate could make his choice?—I do not see any objection to that. Any system could be adopted by which you would get Justices of the Peace.

896. That would only be on remitted cases?—Yes.

Mr. Conrad Christian Silberbauer, examined.

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897. *Acting Chairman.*] You are an Attorney of the Supreme Court?—Yes.

898. You are also a member of the Incorporated Law Society?—Yes, and have been almost since its inception.

899. During your professional practice as an attorney you have had large experience of the practice in Magistrates' Courts?—I was the first attorney in Cape Town to make practice in the Magistrate's Court a regular part of my work. That was in 1885. The practice in those days was almost exclusively confined to agents at law. In course of time matters have changed, and to-day in the Courts of Cape Town and the Cape Peninsula there is a larger number of attorneys practising than agents at law.

900. So you are well versed in the merits and demerits of the Resident Magistrate's Court?—I consider I have had a sound practical experience in connection with it; and I may add that where I have been retained from Cape Town to do so, I have also practised in all the Courts of the Cape Peninsula and in various Courts up-country.

901. I believe a Committee was formed some time ago of law agents and attorneys?—Yes. Early this year a general meeting of all the legal practictioners in the Cape Peninsula was called, and Mr. Cronwright Schreiner, M.L.A., was elected Chairman of that meeting. The practitioners of the Cape Peninsula then decided that the Magistrate's Court Act and the procedure called for reform, and a committee was elected to go into

matters and to suggest those respects in which amendment and reform were necessary. The committee consisted of gentlemen, attorneys, and agents at law who were thoroughly conversant, by reason of daily experience, with Magistrate's Court practice. They went through the Magistrate's Court Act systematically, devoted the greatest attention to every possible section of the Act, discussed every requirement which has arisen in practice, and then issued a report. That report was submitted to a further general meeting of legal practitioners, held on the 18th May last. With a few additions, the matter was re-committed by the general meeting to our Committee in order that it should use endeavours to carry those suggested amendments into effect. I was Chairman of that Committee throughout, and Mr. W. B. Shaw was the Honorary Secretary. The Committee considered it its duty not to confine its work to Cape Town and the Cape Peninsula, and we sent out circulars to all the legal practitioners throughout the Colony, both attorneys and agents. I conducted that section of the correspondence, and received numerous letters from a very large number of practitioners.

902. In your capacity as Chairman of the Committee?—Yes. The resolutions and the suggestions made by the correspondents are embodied in the report of the Committee to which I have just alluded, and in the Bill which has been introduced by Mr. C. J. Krige. The Practitioners' Committee has followed out the resolutions of the General Committee, and the suggestions of all our professional confrères in the country, with one exception; that is, in the Bill which is being considered we have not dealt with the matter of fees. We have deemed it our duty, in the interests of reform, to leave that element out of the Bill, inasmuch as it might be thought that we were asking for this in our own pecuniary interests and not in those directions where we hold that the public need assistance with a view

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of getting more expeditious and economical relief through Magistrates' Courts. The report adopted by the general meeting of the 18th May, to which I have alluded, was duly submitted by us to the Council of the Incorporated Law Society; and I would beg leave to read to this Select Committee the terms in which the Council alluded to the Committee's work. It will be found on page 10 of the Annual Report submitted to the General Meeting of the Incorporated Law Society on the 23rd September last, and adopted by the General Meeting. Under the heading, "Legislation, Section II.," it says, "Amendment of Act No. 20 of 1856: Your Council has been approached by the recently formed Committee of Cape Legal Practitioners, consisting of gentlemen, attorneys and others, who practise in the Resident Magistrate's Court, with a view to securing the amendment of Act 20 of 1856, and has discussed certain amendments with a deputation from the Committee. The Council is in accord with most of the proposals, and has promised its assistance in securing the desired amendments. It was also suggested to place enrolled law agents under the control of the Council of this Society, but this suggestion could not be entertained." Consequent upon the concluding sentence in this report, our draft Bill was amended accordingly. We also had two interviews with the Attorney-General, to whom both the report I have referred to and the draft Bill were submitted, and which we discussed. I may say that as I, as Chairman of the Committee, personally conducted the correspondence with the gentlemen in the country, and I have found no clause in the present Bill with which any of our correspondents are at serious variance. Additional suggestions have been made, but they are mostly of a minor nature, and such as we have not deemed it right to trouble the Legislature with at present. In no case, however, after circularising every individual practitioner in the country, have I received any suggestions in opposition to the scheme of amendment and reform.

903. You have heard the evidence of Mr. Shaw. Do you wish to make any special statement to the Committee, apart from going through the individual clauses?—I have listened with great attention to the evidence which has been given by Mr. Shaw. He has, in my opinion, most lucidly put forward the views of the Committee of which I am Chairman. I agree with the views which he has expressed, in the main, except where he has had experiences which have been purely of a personal character, and which, being in the nature of individual evidence, I am sure the Select Committee will be only too pleased to accept from a gentleman of such vast experience as Mr. Shaw. I would like to say further that all the provisions which have been put in this Bill are thoroughly practical ones, and each of them has been most carefully weighed by the Committee which has put them forward. There may possibly be one or two points of a very minor and technical nature in regard to which I might not agree with Mr. Shaw, but I do not think there is anything material to the issues which the Select Committee are considering on which we are at variance. When I say there are minor points, I would refer, for instance, to section nine of the Bill, in connection with which I must say that I do not agree with Mr. Shaw that the civil imprisonment portions of an action are part of the original action. But this, as I say, is a minor point.

904. *Mr. H. S. van Zyl.*] With regard to that, you would be in favour of the same practice which applies to other cases; that is to say, you must go to the district where the man is if you want to sue him for civil imprisonment, just as if you want to sue him for anything else? At present if a man is not in the same district as yourself you have to sue him in the district he is in?—Yes.

905. If you want to sue a man for civil imprisonment when he is in another district, should you not go to the district in which he resides?—No. I take it under the system

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which has been devised here in section nine of the Bill the writ of civil imprisonment has to be endorsed by the Resident Magistrate of any other district, and it shall then have the like powers and effect as if it had been originally issued out of the Court of the magistrate last endorsing the same. I think the provision with regard to that is perfectly clear. The question in connection with the section which would have to be considered, however, is as to what would be the fairest to the defendant and plaintiff with regard to adjudication on any application the arrested and incarcerated defendant might make to the Magistrate for release, and perhaps that is what is in the minds of the Select Committee. I will give an instance. If a plaintiff is resident in Cape Town, and the defendant has been arrested and lodged in gaol in Victoria West under this section, it may be preferred by some that any application for the defendant's release should be made to the Magistrate at Victoria West. It would be a matter of very great expense to bring the defendant down from a distant district to the district in which the proceedings have originally been taken ; and that is why this section has been so devised as to give the Magistrate of the district in which the writ has been issued the power, as the Magistrate originally issuing the process, to deal with his application for release.

906. The point is, when you have a judgment against a man in Cape and he goes into another district and you want to summon him for civil imprisonment, should you not go to the district where he is, because, as you said just now, you do not regard the civil imprisonment proceedings as being part of the original action ; they are really a new action. That is what I was referring to ?— That is provided for by the amended section five, which says, " . . . . provided, however, that if a summons calling upon any defendant to show cause in such Court why a decree of civil imprisonment should not be pronounced

against him, shall be issued out of the Court of such district after he has removed therefrom as aforesaid, the said summons shall be transmitted to the district in which he shall reside, or shall carry on, or be employed in business, and shall there be served in like manner as that provided in section fifty-two of the principal Act, for the service of a summons upon a witness residing or being in a district other than that from which such summons shall have been issued." That means the summons would be endorsed over.

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907. Yes, to be served there, but the action is to be tried where the summons is issued? The effect of this section is that this man will have to come to the Court where the summons is issued?—So it would be, and it is for the Select Committee to consider and decide which is fairer to the interests of plaintiff and defendant under those circumstances.

908. *Acting Chairman.*] It would also be a hardship for the plaintiff to have to go to Victoria West to prove his case there?—If the Legislature were to adopt those provisions which were put in this Bill with regard to the taking of evidence on Commission that would meet the case to a great extent.

909 *Mr. H. S. van Zyl.*] At the present time, before you can get hold of a man like that, you must first get a judgment of the Supreme Court upon the judgment in the Magistrate's Court, and then issue summons in the Supreme Court?—You have to issue summons of the Supreme Court, get a judgment, and go through the whole process of issuing a writ and a summons for civil imprisonment, at enormous expense—so much so that it is absolutely prohibitive, and people simply abandon their claims rather than incur such expense, so that a vexatious defendant gets off altogether and the plaintiffs do not get their money.

910. You might have a very hard case of a judgment against a man who could not pay, and the man might, quite *bona fide*, go to Kuruman to live,

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and then the plaintiff would issue summons against him for civil imprisonment and bring him down here?—The summons would be served at Kuruman and the case would be heard in the jurisdiction where the plaintiff resided, which would be Cape Town.

911. You would bring the defendant down to Cape Town?—There would be no necessity for that. He could be examined by interrogatories or under the machinery for a Commission.

912. *Acting Chairman.*] Of course the same hardship exists at present. If a man wishes to be very hard on a man at Kuruman, he can summon him in the Supreme Court with Resident Magistrate Court process and force him to the same inconvenience?—And with the greater expense of Supreme Court proceedings.

913. *Mr. H. S. van Zyl.*] The Commission would meet both difficulties?—In my opinion it would absolutely solve both. I have another point in regard to Mr. Shaw's evidence. If I correctly understood him to say that in the Supreme Court practice the costs of maintenance are included in civil imprisonment costs, I wish to say that that is not so in practice; costs of maintenance, in the Supreme Court practice, are a charge on the plaintiff. With regard to section ten, although it has not been considered by our Committee, I think I am in principle agreeing with Mr. Shaw when I suggest, as a personal view, that before cash is attached under any writ there should be evidence of the existence of a *nulla bona* return, and that thereafter the writ for the attachment of cash should issue. This would make the practice consistent with that of the Supreme Court in relation to the attachment of cash.

914. Do you propose the same writ?—No; in my opinion, there would have to be another application to the Magistrate for a further writ for the attachment of the cash by the same machinery which is provided here, and that would absolutely obviate those objections which have been raised that the little cash a man has would be attached,

to the detriment of the carrying on of his business, whilst his goods would be left on his shelves; and I would here like to emphasise the absolute necessity of such a provision in connection with the recovery of debts by means of Magistrate's Court procedure.

915. Have you anything to say regarding Clause Twelve in connection with movable property in the hands of third parties?—In connection with that clause, I wish to confirm fully the experience which we all have in practice as laid down by Mr. Shaw. It is undoubtedly the case that it is possible for the Messenger to attach goods in the hands of third parties as the law stands at present, but unless some provision such as that referred to in section twelve is made the law becomes a dead letter, owing to the messenger, in his own protection, demanding an excessive indemnity. In order to prevent anything which might be regarded as likely to result in the possibility of injustice to any third party, I would suggest, as a personal opinion, that the magistrate be allowed to demand from the plaintiff an indemnity bond, not in favour of the messenger, but in favour of the third party, in case such an attachment were not a proper one and would inflict damage or injury on the third party. I believe this would meet any possible objection which could arise.

916. *Mr. D. M. Brown.*] Would you be in favour of having remitted cases under the existing jurisdiction tried by a magistrate presiding with two Justices of the Peace, of not less than 40 years of age and five years' experience, and not in the Public Service, thus combining the Magisterial and the jury systems?—This question being entirely new to me, I would beg to be excused from answering on so important matter without mature reflection.

917. *Acting Chairman.*] Do you agree with what Mr. Shaw has said on the question of jurisdiction?—Yes, I agree with his evidence on that matter generally.

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918. *Mr. D. M. Brown.*] Have you any suggestions to make which will lessen the charges of messengers for the service of process at long distances?—A suggestion has been made, and although not considered by my Committee, I have been requested to bring it forward, namely, that in connection with the service of subpœnas there shall be in the Magistrate's Court the same right which there is in the Supreme Court for the service of process by an individual who is not a messenger of the Court.

919. There is no provision in the Bill for that?—None has been made. It is a suggestion which came after the Bill had been framed.

920. But have you any suggestion to make to lessen the charges of messengers for the service of process at long distances?—No, because it is provided for in the tariff.

921. Sometimes it is necessary go 100 miles. Can you make any suggestion for the lightening of the charges, because that is generally the most expensive part of a summons?—It would so greatly depend upon the nature of the country which the messenger had to traverse—the district might be without roads or subject to drought—that I would not feel competent to express an opinion.

922. Do you not think the difficulty would be met by having some special person in that district to serve the process?—Our Committee considered the question of entrusting the services of summonses to persons who did not hold the appointment of messenger, and decided against it.

923. Are you aware that in Scotland the summonses are served by registered post, and on the presiding magistrate being satisfied that the person has received the summons, he goes on with the case, or if not, orders special service by a clerk, at a very low cost comparatively? A policeman might be authorised to be the messenger for the serving of that summons?—The practice in other countries was considered by the Com-

mittee most carefully, and the decision was arrived at that, under the present circumstances of our country, the service of summonses should be left to the existing machinery.

924. *H. S. van Zyl.*] You certainly would not approve of service by registered letter being instituted?—I do not consider the circumstances of this country at present are such as to render it possible that service by post would be fair. I fear it is very possible that grave injustice might arise in that way.

925. The Supreme Court does order serving by registered letter, but very rarely?—Very rarely, and certainly not with process calling upon a defendant to answer a claim put before it. In the Supreme Court in regard to the attachment of landed property notices to tenants are allowed to be given by registered letter.

926. *Mr. D. M. Brown.*] Are you aware that at present a messenger will employ a person in a special district—say a police constable—and will post the process to him to be served, and then charge full fees as if he had himself travelled the full distance?—I do not know of such a practice, but if it is done the messenger must bear the responsibility of what occurs.

927. A Messenger may get £5, and he arranges with the local people to serve, and pockets £4 15s. 0d. himself for sending a registered letter?—I am not aware of such a practice.

928. Would you not appoint a person in the district rather than risk such a practice? What is the use of a man riding 100 miles to serve process when a man in the district can do it for a tenth of the cost?—That is a matter which I think might well be considered by the Law Department.

929. Would you be in favour of leaving to the Judges, the same as with fees, the regulation of the appointment of messengers or deputy messengers, or any other persons they considered most efficient and most economical for dealing with process according to the circumstances of

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the country?—I think that should be arranged by the magistrates in consultation with the Law Department.

930. Would you not leave it to the Judges, the same as with the fees, and they would act upon advice from the Attorney-General's office?—I see no objection to the Judges of the Supreme Court making rules with regard thereto, but I believe that in practice the Judges, before making rules on such subjects, would consult the Law Department.

931. *Mr. H. S. van Zyl.*] As regards the number of appointments to be made in a district, that should not be left to the Judges?—I hardly think it necessary to burden the judges with the task of going into questions of that sort.

932. They have nothing to do with matters of administration?—That is so.

933. *Mr. D. M. Brown.*] All I want is that the form of serving the process and the means of doing it should be to the satisfaction of the Judges?—The form as to how it should be served is already provided by law.

934. But I think the present form is costly?—You mean the system?

935. *Acting Chairman.*] You would prefer the Attorney-General to arrange these things rather than the Supreme Court?—One would be perfectly satisfied that the Judges of the Supreme Court would do what was right in the matter, but I think asking them to intervene in what I would regard as a Departmental matter is throwing unnecessary work on them.

936. *Mr. D. M. Brown.*] I do not mean it as a Departmental matter, but that anything arranged by the Attorney-General's Department should receive the Judges' approval. Would you be in favour of leaving everything entirely to the Attorney-General's Office?—I am quite in favour of the appointment of Messengers to the various Courts of Resident Magistrate being left in the hands of the Law Department.

937. I mean the process for service and all rules

and regulations appertaining thereto being approved of by the Judges?—The question is of so general a nature that if it were possible for the Judges to find time to decide on all these matters there would be no necessity for asking for Legislative intervention in order to amend and reform the Magistrate's Court procedure. Mr. C. C. Silberbauer. — Nov. 11, 1909.

938. I am dealing with the form of service?—There is no necessity to ask the Judges to intervene with regard to the form of service; the law already provides for the way in which process shall be served.

939. *Acting Chairman.*] There is no need for reform on that point?—No need.

940. Are you in favour of having Deputy Messengers or Additional Messengers appointed where the circumstances of the different districts warrant such appointments?—Certainly.

Friday, 12th November, 1909.

PRESENT:

MR. C. J. KRIGE (Acting Chairman).

Mr. H. S. van Zyl.	Mr. Cronwright Schreiner.
Mr. D. M. Brown.	
Mr. Oosthuisen.	

Mr. Conrad Christian Silberbauer, further examined.

941. *Acting Chairman.*] Do you wish to say anything further in connection with Mr. Shaw's evidence?—I would like to say with reference to his evidence on section six of the Bill that my opinion of the jurisdiction of Magistrates' Courts is in accordance with the views expressed by the Chief Justice in the case of Smit *vs.* Phillips, reported in 16, *Cape Times* Law Reports, page 1109. If I understood Mr. Shaw correctly, he said that the Magistrate would have jurisdiction to try in one suit claims in convention for, say, promissory Mr. C. C. Silberbauer. — Nov. 12, 1909.

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notes up to £250, goods sold up to £100, damages up to £20 and ejectment.

942. Ejectment, provided the value of the lease does not exceed £40?—I do not know what he said. It is a matter of opinion, but I interpret the judgment of the Chief Justice in the case I have quoted to be that in such an instance the damages could not be included in the same suit.

943. *Mr. Cronwright Schreiner.*] What is your comment upon Mr. Shaw's evidence with regard to claims in reconvention of greater and lesser amounts?—I agree with Mr. Shaw that where the liquid claim was up to £250 the defendant could claim in reconvention up to £250.

944. *Acting Chairman.*] Whether the claim in reconvention is for damages or anything else?—Yes. Whether such a claim could be made in a case where the liquid claim is under £100 is a matter of opinion.

945. Supposing A had a claim against B for £250 on a liquid document and B set up a claim in reconvention for £150 for goods sold and delivered, and proved his claim to be *bona fide*, would not that, under the present law, oust the jurisdiction of the Magistrate?—Not in my opinion, and I would refer the Committee again to the decision of the Chief Justice which I have just referred to, and also to the case of De Wet *vs.* Theron, reported in 16, Supreme Court Reports, page 421. I think these two cases will clearly set the state of the law before you. I would also like to make it clear with reference to my evidence yesterday as to the manner in which a civil imprisonment decree would operate in regard to a person removing from one district to another, by giving two typical cases. Case A: the defendant, resident in Cape Town, is sued for debt, judgment is taken against him, a writ is issued, and there is a *nulla bona* return. He then removes, say, to Victoria West. The plaintiff wishes to sue for civil imprisonment. Under section 5 of the Bill as amended the civil imprisonment summons would be issued in Cape

Town and would be endorsed over to the Messenger of the Victoria West Court as is done in the case of a subpoena under section fifty-two of the Principal Act. The defendant would presumably be unable to appear in Cape Town. He would then have to instruct some one to appear for him on the return day. I take it his representative would then apply to have him examined by interrogatories, or preferably on commission, and the Cape Town Magistrate would not give the decree until he had had the defendant's evidence. The Cape Town Magistrate would, of course, also hear the evidence on behalf of the plaintiff. If the decree was granted a warrant of arrest would be issued by the Cape Town Magistrate and, under section nine of the Bill, it would be endorsed over to the Magistrate of Victoria West and the Messenger there would then lodge the defendant in the Victoria West gaol. Then the next case will be case B. The defendant is resident in Cape Town, and after the decree of civil imprisonment, and either before or after the issue of the warrant of arrest in the Cape Town Court the defendant removes to Victoria West. In this case, under section nine of the Bill the warrant would be endorsed over to the Victoria West Court and the defendant arrested and lodged in gaol at that place. I would like to suggest that in section nine of the draft Bill after the word "warrant" at the end of line eight the words "or writ" should be inserted. That is just a clerical omission. I would also like to make the observation that, according to the decision of the Supreme Court in H. *vs.* Bossi, reported in 4 Juta, page 72, any application for the discharge of a debtor or the suspension of the warrant must be made to the Magistrate who issued the warrant. I must leave it to the Select Committee to decide which Court the application should be made to in the case of a warrant endorsed from one Resident Magistrate's Court to another under this Bill, if it becomes law.

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946. *Mr. H. S. van Zyl.*] The object should be to

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make it as easy as possible for the man to obtain his release?—I would incline to that view, consistent of course with the interests of the plaintiff, who should have an opportunity of being heard. We have the same thing in the Supreme Court, where a defendant is lodged in a country gaol and his application has to come to the Supreme Court.

947. *Mr. D. M. Brown.*] That is not an analogy. In that case there are affidavits and replying affidavits?—I have indicated that I must leave it to the discretion of this Committee to decide what would be fair to all concerned.

948. *Mr. H. S. van Zyl.*] What I would like to know is, why should you draw this distinction between civil imprisonment proceedings and other proceedings, where in other proceedings you have to go in the defendant's district if you want to sue him in the Magistrate's Court? Why should the plaintiff be given this advantage in the case of civil imprisonment?—Because the provisions which have been made are intended to apply to those cases which so very frequently occur in which defendants, in order to evade civil imprisonment, by reason of their knowledge of the present law go into other districts, thereby intentionally evading payment of their debts.

949. In what respect are you in a worse position in regard to a man like that than if a man who owes you a lot of money goes into another district before you sue him for it. If you have a liquid claim against him for £25 and he goes into the Calvinia District you have to go to Calvinia if you want to sue in the Magistrate's Court, otherwise you have to sue in the Supreme Court?—Yes.

950. If that is so with regard to moneys due to you, why should you be put in a different position when you want to sue a man for civil imprisonment after you have already obtained judgment against him on the £25?—Because if the defendant had originally been resident in the district of Calvinia, then a plaintiff would have had to go

to that Court and pursue the proceedings where the defendant resided. If after that judgment and issue of writ the defendant left the district of Calvinia and proceeded to another district it would be impossible, under the existing law, to pursue the judgment without having recourse to the expense of proceedings in the Supreme Court to which I have alluded.

951. *Mr. Oosthuisen.*] I understand your distinction is that when you have already obtained judgment against a man and he removes to another district then you can act through the other Magistrate?—Yes. It is simply a provision for following up judgment which you have originally obtained in the one district, and following the defendant with the execution of that judgment into any other districts to which he may proceed.

952. *Mr. Cronwright Schreiner.*] Without a break and without repetition of the steps gone through?—Yes. The break would mean delay and the repetition of the steps would mean unnecessary expense.

953. *Mr. D. M. Brown.*] I understand you to state that you would allow the witnesses to be examined by interrogatories or commission on the civil imprisonment summons and send the evidence to the Magistrate at Cape Town, who, after hearing witnesses here, would give his judgment?—Yes.

954. How is the Magistrate of Cape Town to give his judgment if the interested persons have no opportunity of cross-examining the witnesses up-country?—The opportunities for cross-examination would be just the same as would exist in any other case of interrogatories, or preferably by commission, and that is the reason why we have deemed it so necessary that there should be an amendment of the law with regard to the taking of evidence.

955. *Acting Chairman.*] On commission?—On commission as well as by interrogatories.

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956. *Mr. D. M. Brown.*] The cases we have heard quoted mostly are all in the Cape Peninsula —a person moving from Cape Town into Woodstock, and *vice versa*, so that he is practically within the geographical jurisdiction but not the legal jurisdiction of the Court?—You have heard correctly, and that is a most long-standing grievance.

957. Instead of making a drastic alteration in the law, how would an amendment do to the effect that if it appeared reasonable to the presiding magistrate that the person should answer in his Court he should be able to make him appear? Would that meet you to any extent?—No; I do not think that that would be of any practical assistance. It would in practice lead to confusion. One Magistrate might exercise his discretion in one way, and another Magistrate in another district in another way, with the result that confusion would arise, and people would not know where they were.

958. In the exercise of jurisdiction it is common every day for Magistrates to take different views?—That may be in other matters, but as applicable to this case I am expressing my opinion, in response to the question asked me, that it would not work well.

959. I remember twenty cases coming before the Magistrate's Court in regard to Sunday trading. The cases were divided, the Magistrate taking ten and the Assistant Magistrate ten. The unfortunate persons in one Court were fined £3 each, and the other people in the other Court were only fined 10s. each. Both Magistrates were honest in their convictions?—What you state supports the opinion which I have expressed. I would like to add that the evasion by defendants under the circumstances I have mentioned does not only apply to the Cape Peninsula, but I have had practical experience of their proceeding to districts at a greater distance; and I consider for that reason that, in the interests not only of Cape Town, but of creditors in the country, this

law needs amendment. I would also like to state that in going to the extent of amending this Act, the Committee in Cape Town have been most careful not to take a parochial view of it; in every case they have studied the conditions of the country; in fact, in many cases where provisions would have been a pure convenience to those practising here they were omitted to provide for what we considered the general good. I may add that in several communications which I have had from country correspondents there have been distinct requests that the law on this point should be amended in the direction which I have indicated. Mr. C. C. Silberbauer. — Nov. 12, 1909.

960. Would you allow, after a person's furniture has been seized, that the magistrate should have authority to suspend the execution while the person paid instalments?—I have very seriously considered that question, and feel bound to answer it in the negative.

961. Would you make any limit as to the amount of seizure? Supposing a person only had £10 worth of furniture, would you allow that to be sold up, or would you make a limit?—I would not feel inclined to make any limit beyond what is already provided for in the law with regard to working tools and so on.

962. What is the limit of exclusion now?—Tools and wearing apparel to the value of £5.

963. Have you never heard that a bedstead has actually been sold from under a sick person and only the bedding left?—Never in my experience. I may state that in all cases which I have had, and which I am aware other practitioners have had, we have always endeavoured to act in the most lenient way possible, and where anything to the contrary has been done it has been on the emphatic instruction of the client. Never in my experience have I had a case of a client acting in a vindictive spirit.

964. Have you heard of a system of arresting wages?—I have heard of such a system.

965. Whereby 25 per cent. of the wages, with a

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minimum named by the Magistrate, is allowed. Do you not think that is a more preferable system than selling up a person's furniture?—No; I do not advocate that. That was also considered by our Committee, and the opinion was against it.

966. Do you think the experience of civil imprisonment is that it is conducive to the payment of debts?—It is conducive to the payment of debts where the defendant is able to pay, and is conducive to the ending of the matter where he is unable to pay; and on this subject I would beg leave to remark that, in my experience, the Magistrates are most careful and scrupulous in their examination as to the means of the defendant, in order that no injustice may be done to a poor man.

967. *Mr. H. S. van Zyl.*] They never grant an order where it is clear that the man has no means?—Never. In my experience the tendency of our Magisterial Bench is on the side of leniency. I consider everything is at present administered in a most proper and humane manner. Cases do arise where these defendants are contumacious and vexatious and where, knowing that the plaintiffs have to pay the costs unless they can prove their vexatiousness, they let the proceedings go so far that the plaintiffs are the losers in their endeavours to recover their just debts.

968. *Mr. D. M. Brown.*] I believe the law at present is in ordinary debts that the judgment expires in twelve months?—Yes.

969. Is that the law in civil imprisonment?—I could not say from memory. I do not think so.

970. If it is not the law, would you not be in favour of a decree of civil imprisonment being brought under review again after a period of twelve months has elapsed without issuing the writ?—Any procedure which would avoid additional expense in these cases would be favoured by my Committee.

971. I mean the writ would be issued a long time afterwards. A simple notice served on the defendant would be sufficient?—The same answer

would apply. With regard to section fifteen of the Bill, I wish to emphasise Mr. Shaw's evidence as to the necessity of amending the concluding part of this section so as only to provide for the re-arrest of the defendant if he has been released from civil imprisonment on any agreement to liquidate the debt. Mr. C. C. Silberbauer. Nov. 12, 1909.

972. *Acting Chairman.*] That is the only case in which you support the re-arrest?—Yes, and I am perfectly sure that my Committee are at one with me.

973. *Mr. D. M. Brown.*] Suppose the Magistrate has suspended the writ in consequence of the person being unable to pay, and then two or three years afterwards he gets into a good position, will you not allow the matter to be brought up again? —Certainly.

974. But you have not said that?—But that does not apply to what I have said. With regard to sections twenty-two and twenty-four, I wish to direct the attention of the Committee to the fact that, inferentially, the provisions of section twenty-four might be held to apply to both Supreme Court and Magistrate's Court practice. My Committee has been divided on its applicability, and a minority considered in regard to Clause Twenty-four as amended that the words "or to permit any enrolled agent being in partnership with any attorney other than in respect of their practice in such Magistrate's Court" should be added. I have deemed it my duty to state this in order that a minority view might also have the consideration of this Select Committee. My personal opinion is that the circumstances up-country are such that young attorneys may find it difficult to get a footing in places where old-established, respectable and competent enrolled agents at law are practising, but I wish to emphasise my opinion that if attorneys are to be allowed to practise in co-partnership with agents at law there should be a distinct provision that these attorneys are not thereby relieved from their responsibility as

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officers of the Supreme Court, and especially that the agent at law shall not act as an attorney or hold himself out as an attorney.

975. *Mr. H. S. van Zyl.*] Do I understand that you favour this partnership between an attorney and a duly enrolled law agent?—Under the circumstances which exist in the country to which I have referred and with these reservations and statutory restrictions.

976. Would you not have a rather curious anomaly that two men would be in partnership, one of whom would be responsible to the Law Society—or you might say under the jurisdiction of the Law Society—whilst the other person, his partner, would not be responsible to the Law Society at all?—That would be so; but one must frankly and candidly admit that according to the evidence given, although these partnerships may not at present exist in a way that one could fix them as partnerships they are supposed to exist by some other means. The people sit in the same office. The agent-at-law sees the client or the attorney sees the client, in accordance with the exigencies of their work, and although the agent and attorney may be only sharing the work *qua* Magistrate Court and extra judicial agency, there might possibly exist some consideration which would pay the agent for giving his time to the attorney in connection with his Supreme Court practice.

977. *Acting Chairman.*] Do I understand that you favour even the Supreme Court fees of the attorney being shared with the agent?—In a partnership?

978. Yes?—Personally I do not like the thing, but from a purely practical point of view, and being aware of the general conditions which prevail, and in regard to the circumstances up-country to which I have alluded, I consider that it would not be unwise to legislate on certain lines in the matter.

(At this stage the Acting Chairman left the room, and Mr. D. M. Brown took the chair.)

979. *Mr. H. S. van Zyl.*] Where a law agent was in partnership with an attorney he would become entitled to all the privileges of an attorney without really incurring the obligations of an attorney towards the Law Society, because he would not be an officer of the Supreme Court ?—That would be so, and it would rest entirely with the attorney then whether he agreed to go into partnership with an agent-at-law under conditions which I would regard as disadvantageous to the attorney.

980. You know the Law Society would naturally be against anything like that being allowed ?—I understand the Council of the Incorporated Law Society is against it, and I have respect for their reasons. I am only expressing a personal view on country conditions, and one of the stipulations I would like to express as an absolute *sine qua non* to any approval on my part being given to such a partnership, is that section twenty-two should become law ; I would only give the qualified approval I have given to a partnership between an agent-at-law and an attorney if section twenty-two were carried, and absolutely not otherwise.

981. *Acting Chairman.*] The impression I gathered from the evidence of Mr. Fairbridge was that the Incorporated Law Society approve of such partnerships, provided that the Supreme Court fees were kept entirely separate and for the benefit of the attorney. What do you say to that ?—I would say that would be the ideal, but I doubt whether it could be carried out in practice.

982. *Mr. H. S. van Zyl.*] You say you would make it conditional upon clause twenty-two becoming law, but how does that affect the principle ?—To the minds of many, the principle involved is this that, owing to the circumstances which existed from 1856 and thereafter, we have allowed a legal race to spring up for the convenience of the people of the country called enrolled law agents. These gentlemen, during this time, have been of the greatest assistance to the public in towns and

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the country districts; they have often taken a most active part in the development of the various towns and districts. They have helped the people in legal matters and matters incidental thereto; and they have acquired in the country almost a vested right with regard to legal practice. They have practically, where there have been no attorneys—and even where there are attorneys—been doing Supreme Court work, which work they have sent up to Cape Town solicitors on an arrangement of participation in fees. The circumstances of the country to-day, however, are altered. A large number of qualified attorneys are spreading all over the Cape Colony. The law agents are, in my opinion, a dying race, and very few more can be admitted; and if you are to administer the law strictly, and honestly interpret the matter of the allowance of fees between law agents and attorneys, you have undoubtedly to face the position by some legislation such as has been suggested.

983. But are there not still up-country places where you have no attorneys at all, or only one attorney practising, and where it would be desirable to admit law agents?—I cannot think of one place in which the requirements of the public would necessitate the admission of an agent at law and in which an attorney would not settle. Young attorneys come to me and ask my advice as to places at which to set up, and one finds all round the place that all the territory is already occupied.

984. You may have one attorney at a place. You may have two, and then no law agent can be admitted; but if there is only one attorney is it not desirable that you should give an opportunity for some one else to be admitted? Have you not sufficient protection now in the provision that a law agent cannot be admitted where there are already two attorneys?—I think the position to-day is that if one attorney can exist in a small up-country town, and there is still room for a law

agent, there will always be found a young attorney ready to fill the place. Mr. C. C. Silberbauer. Nov. 12, 1909.

985. Let him go there, and then no law agent will be admitted?—Then I consider the higher qualifications required by an attorney demand, in the interests of the public, that attorneys should settle in these places and not any more law agents.

986. The Legislature has recognised that attorneys should in some respects be protected, and it has made provision for that in so far as when you have two attorneys in a place no law agent can be admitted?—Since that became the law the supply of attorneys has so far increased that I consider they will be able to supply all vacancies without falling back on law agents.

987. If you do that then law agents cannot be admitted. If you have a place where there is one attorney only, and you cannot get another attorney to settle there, it may be a great hardship upon the people. Say a case comes into Court and the plaintiff secures the attorney, then there is no one to assist the defendant, because there is no attorney there and a law agent cannot get admitted there?—Yes, that is so if such cases do exist, but I can hardly believe that there are places to-day in which it is worth a practitioner's while to start that would not immediately be filled.

988. *Mr. Cronwright Schreiner.*] There was some discussion with the Incorporated Law Society—I do not know whether it came before your Committee—following out this idea of gradually eliminating the law agent class by allowing them to qualify as attorneys, on the understanding that they passed all the examinations necessary for an attorney to pass, and provided that instead of articles they had not less than seven consecutive years' practice behind them. Do you favour that?—I have not sufficiently weighed the details of that matter to be able to express a definite opinion. It was excluded from my committee.

989. *Acting Chairman.*] Do you not think, from the higher standard, the better education and the

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greater experience of Magistrates to-day, that they demand a person of higher qualification than the average person enrolling to appear before them, in justice to them as well as in justice to the public?—My personal experience of the agents-at-law practising before the Magistrates is in connection with gentlemen who have had a good experience, and, I, therefore, could not express an opinion with regard to any of those who have been recently admitted as agents.

990. Do you not think the higher standard of qualification of Magistrates demands that you should have a person of at least equal education?—Most certainly. Before the Committee leave this section, I should also like to add with reference to section twenty-four that, regard being had to the circumstances of the country, it may be expedient to permit of such a sharing of fees with a "corporation or company" as is, I think, inferred by section thirty-six of a Bill which was drafted by the Incorporated Law Society. I have not a copy of that Bill with me, but will forward one to the Committee. I may state that this is a personal opinion. In regard to the sections of the Bill dealing with unqualified persons practising, a great reason against their being allowed to practise is that the Courts would have no control over unqualified persons. I do not think this point has yet been brought to the notice of the Select Committee.

991. *Mr. H. S. van Zyl.*] The moment an unqualified person holds himself out as a qualified man the Court has power?—But at present a lot of unqualified people are doing work which is, in our opinion, legal work. They do this without pretending to be qualified persons, but they nevertheless do it; and we think the provision here would meet their case. The section says, "... doing or offering to do for payment in cash or for any other reward or consideration any act usually done and falling within the scope of the practice of a duly qualified practitioner."

That is certainly capable of the interpretation to which I have alluded. With regard to clause twenty-six, I have to state that it was re-cast on the suggestion of one of the gentlemen present at an interview on behalf of the Council of the Incorporated Law Society. It was thought that as the section appears in the Bill it would result in there being no fees payable for work done until such time as the Judges had framed a tariff of fees. The amendment put in is to provide against that. Mr. C. C. Silberbauer. — Nov. 12. 1909.

992. *Mr. D. M. Brown.*] With reference to Clause twenty-eight, what is the purpose of the words at the end "at the time and prior to the promulgation of this Act?"—No injustice would arise if section twenty-eight became law if the provision contained in section twenty-two of the Bill were adhered to, whereby the "rights of all persons admitted and enrolled as such agents at the time of and prior to such promulgation shall not be modified or in any way affected hereby, but shall continue exactly as if this section had not been enacted." Perhaps there is no necessity for the words "at the time and prior to the promulgation of this Act." I will leave the decision of that to the Select Committee. I may state I do not think my Committee would have any objection, if the Attorney-General found it impracticable to agree to section thirty as amended, to a clause being inserted in the Bill which would provisionally operate in such wise as to have the wish of an accused person recorded at the time of his being committed for trial, without compelling the Attorney-General or Solicitor-General or Crown Prosecutor, as the case may be, to give effect to that wish on the part of the accused person. With regard to the Schedule and the Rules, I would say that I am entirely in agreement with Mr. Shaw's evidence. I have most carefully weighed all the objections which I have heard urged to Rule two in connection with country suitors, and consider the adoption of this Rule will be a greater convenience than the present system. I may state that the framing

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of these Rules received the most careful consideration of my Committee, which, as I have already stated, consisted of men who work in the Courts every day of their lives. With regard to Rule seven, I have been desired, on behalf of a country solicitor, to represent that the seven days mentioned in that Rule do not give sufficient time to enable country clients to consult Counsel on the advisability or otherwise of appealing. With regard to section twenty-nine of the Bill, there has been a mistake made. After the word "by," in line 37, there should be inserted "section four of Act No. 21 of 1876, as amended by."

Mr. George Blackstone Williams, examined.

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993. *Acting Chairman.*] Would you give us your experience as a Clerk in connection with Magistrate's Court work, and as a Magistrate?—I have had thirty years experience in connection with the Magistrates' Courts. I was a clerk from the end of 1879. Immediately on the promulgation of the Act in 1882 I was appointed an Assistant Resident Magistrate of Kimberley. I continued in that capacity until 1895, when I became Assistant Resident Magistrate at Cape Town. In 1902 I was appointed Resident Magistrate of Wynberg and in 1908 was appointed Resident Magistrate for the District of the Cape. I have held my present appointment for a year.

994. So your experience has been principally in large centres of population?—Entirely.

995. Would you just take the Bill and give us your opinion on the various clauses?—I made a memorandum, to which I would like to refer. The only suggestion I would make as regards section four is that the words "or being employed in business" might be struck out.

996. So that an employé should not be brought in?—I think the wording is vague, and may lead to confusion.

[At this stage the Acting Chairman returned, and Mr. D. M. Brown vacated the Chair.]

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997. *Mr. D. M. Brown.*] With regard to section five, I presume the intention of this section is to allow a person against whom a judgment has been taken, say in the Cape Town Court, to be followed up by civil imprisonment proceedings in the same Court, although at the time of the civil imprisonment proceedings he is residing, say, in the Wynberg district?—I would say this with regard to civil imprisonment proceedings, that I think it is reasonable that a man should not be allowed to evade the result of a judgment given against him simply because he has changed his residence. But, at the same time, I think if judgment was given against a man in Cape Town on a small debt, and, without any idea of evading the consequences, he afterwards changed his residence to Kimberley, it would be very hard lines to bring him back to answer a civil imprisonment summons in Cape Town. Of course, if he merely removed to Woodstock or Wynberg, that would not apply. The matter appears to be a very difficult one to decide, and one on which I am bound to say I cannot entirely make up my mind.

998. *Acting Chairman.*] Did you hear the evidence of Mr. Silberbauer?—Yes.

999. Would not evidence being taken on commission or by interrogatories satisfy any scruple you may have on the subject?—Yes. I am not in favour of commissions. It might be done by interrogatories, and I think that would be the best plan. It is easy to conceive that circumstances would arise where hardship to the judgment creditor would occur, or to the judgment debtor. It is a difficult point.

1000. *Mr. D. M. Brown.*] You heard my suggestion to fix a mileage area, so as to bring in Woodstock and Wynberg?—I think if you made the limit 25 miles many people wanting to get away would go 26 miles; some of them are quite knowing enough to do that.

1001. *Mr. Cronwright-Schreiner.*] It would not help in the up-country districts?—No.

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1002. *Mr. H. S. van Zyl.*] In attempting to deal with people who are wilfully evading their obligations, you have to take care that you do not inflict hardships?—That is where the difficulty comes in.

1003. As the section stands now, do you not think the operation of these provisions may be rather harsh in some instances?—It may be. I think hardships may arise in any legal proceedings—or what appear to be hardships.

1004. Would it not, therefore, be better to leave the law as it is at present in regard to this?—I am rather inclined to think so. When I went through this Bill and made certain notes, I must say I was thinking principally of the judgment debtor leaving Cape Town and going to Woodstock or Wynberg. I was thinking of matters near home. But I think, perhaps, when one considers the enormous area of the country, and so forth, that it might be well to leave things as they are, because in an important matter it is always possible for a judgment creditor to get provisional sentence in the Supreme Court on a Magistrate's Court judgment, and proceed in that way.

1005. *Mr. Cronwright Schreiner.*] That will not help up-country people. This is a point upon which I have been approached by numerous practitioners, and I have not had one against it—where the debt contracted is not large enough to justify proceedings in the Supreme Court and they do not want to re-open the case in another Court. If that meets the convenience of the up-country people you will not be opposed to it?—I would say this, that if it is not worth while going to the expense of taking proceedings in the Supreme Court, then presumably the debt is of a petty nature, and I would not harass the judgment debtor too much where the debt was a small one. If you could fix a limit of the monetary amount upon which you could proceed to another district, it might be well to do that.

1006. *Acting Chairman.*] Have you anything to say with regard to section six?—The note I made

was that I see no objection to the proposed increase of jurisdiction. I was careful, in preparing my memorandum, not to make any fresh suggestions, but rather to criticise the Bill as it is.

1007. *Mr. H. S. van Zyl.*] What do you understand the effect of sub-section (3) of section six to be?—I should take that to mean that if a man was summoned for any amount—of course within the jurisdiction—either liquid or illiquid, he might counter claim for a similar amount.

1008. Why exactly is that section necessary?—I did not frame the Bill, and do not know the intention.

1009. To-day the law is that "as often as any action or suit shall be brought upon any liquid document for any sum exceeding one hundred pounds, as aforesaid, the Resident Magistrate shall have jurisdiction to try any plea of set-off or compensation or any cross claim or claim in reconvention not exceeding the amount demanded by the plaintiff in his summons, whether the plaintiff shall or shall not succeed in proving the amount so demanded to be due"?—You are quoting from Act No. 20 of 1856 as amended by Act No. 43 of 1885?

1010. Yes?—The original Act of 1856 provided—I am speaking from memory—that in liquid cases a counter claim up to £40 could be taken. Then I think the jurisdiction was increased by a subsequent Act, No. 43 of 1885, and it was then provided that if a liquid action was taken exceeding £100 the defendant might counterclaim for any amount exceeding £100, but there is no provision made, as far as I am aware, for a counter claim, against any liquid claim, for a sum between £40 and £100.

1011. *Mr. Cronwright Schreiner.*] And this would give it?—Yes, and also extend it very much in regard to other matters. It would extend the jurisdiction on counter claims in illiquid cases.

1012. *Mr. H. S. van Zyl.*] Do you not think it is desirable that that should be done?—I think it is

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rather more for the public to express an opinion as to what jurisdiction the Court should have. I do not think there would be any danger, if I may be allowed to say so, in extending the magistrates' jurisdiction.

1013. *Mr. D. M. Brown.*] It has been suggested, and I want your opinion upon it, that the magistrate's jurisdiction in an ordinary claim should be £50; it has even been suggested to make it £100. Would it not be a dangerous proceeding to give him jurisdiction in an action of tort up to £250? I know it is a personal matter, but do you think it would be judicious to give the ordinary magistrate jurisdiction up to £250 in tort?—I do not. I would not give him beyond £100, although I see no objection in going as far as £100. Clause seven refers to official referees. I see no necessity for this section. As a matter of practice—I am talking of my own practice now—in cases of very complicated accounts, with the consent of parties, I have referred the matters to an accountant, and based my judgment upon his report. I am not in favour of referring matters in the manner suggested by the section. It is always competent in technical matters to take expert witnesses. For instance, suppose we have a case of a dispute over the construction of a building. The Court would hear architects giving expert evidence, and that evidence would be admissible, and the Court would form its judgment upon the evidence of the experts. I daresay a great many of my colleagues would be in favour of this. Personally, I would sooner form my judgment on the expert evidence I hear.

1014. *Mr. Cronwright Schreiner.*] You will notice it is discretionary?—Yes.

1015. At present you have to get the consent of both parties, but in this clause it is in the Magistrate's discretion. It might save the litigants a lot of expense, might it not, in calling a lot of witnesses?—It might, but I do not think it would save much. Take the architects' case I mentioned.

I think you would very seldom find the parties would be agreed upon the opinion of one single architect. They would say, "Oh, no, what is the use of having one man; we do not agree with him; let us have another." I think they would very seldom agree upon a referee. It is my experience that in a contested case you very often have half-a-dozen professional men on either side.

1016. Your conclusion is that this clause is not necessary?—I do not think it is advisable.

1017. *Mr. D. M. Brown.*] If it were a small dispute 100 miles away, involving say £10—such as you may easily get in this country—would it not be advisable for the Magistrate to nominate referees?—If the parties consent I should not hesitate to do it. I should be only too glad in complicated matters.

1018. Supposing there was a wealthy litigant opposed to one who was not wealthy the wealthy man might not agree. Do you not think the Magistrate is the best person to exercise his discretion as to whether he shall send a case to referees or not, rather than the parties?—You mean the Magistrate should have power to do it without the consent of the parties?

1019. Yes, if he thinks it will cheapen the litigation and be to the benefit of everyone?—I would not go to that length. I do not think it would satisfy the public. If the litigants consented to such a course I would do it without this section.

1020. Where do you get the authority for the costs?—They must arrange for them before I make any such order.

1021. Would you not like a clause for the Magistrate to have power to order the costs to be taxed?—I do not think it is necessary. I do not think there is any objection to the section, but I do not see the necessity of it.

1022. *Mr. H. S. van Zyl.*] I think your last sentence is not correct. As the Clause stands now, the Magistrate can refer it without consent, and

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you do not agree with that?—I should prefer not to do it without that consent of parties. In regard to section eight. I have made no note on this.

1023. *Acting Chairman.*] Have you any note on Clause Nine?—The section seems to be unnecessary as far as the warrant against movables goes. There is already sufficient machinery for the execution of such warrants in other districts. I think that warrants of civil imprisonment, except in respect of trifling amounts, should be made executable in other districts in the same manner as is the case with warrants against movables. It would be necessary, of course, to fix the trifling amount which I suggest. I am not in favour of extending the meaning of the word "movables" in section ten.

1024. Have you any specific reason for saying this?—I do not know of any hardships which have been caused by the present state of the law. Of course when I have once given judgment and signed the warrant of execution I scarcely know what is done afterwards. I think in a Court of limited jurisdiction it might lead to a great increase of litigation in the way of interpleaders and actions of that sort if certificates of shares and so on were placed under attachment under judgment of the Court.

1025. Of course the party affected would have the same rights of interpleader?—Undoubtedly. I am very strong on that point. Personally I should prefer the law to remain as it is.

1026. *Mr. Cronwright Schreiner.*] If scrip is omitted, many of us—especially up-country people. where it is largely a matter of wages—think that we should have power to attach cash over, say, a certain amount?—Cash in the hands of a banker?

1027. Anywhere. You have no strong objection to that?—I have no very strong objection. I think difficulty might arise in regard to the words "or its equivalent." You were asking me about the attachment of wages. I heard the

evidence of the last witness on this matter. I have never considered the point myself, because it has never occurred to me; in fact I was unware of any machinery for attaching wages which might be paid in the future. If you could substitute such a provision for civil imprisonment—which is a thing I am rather opposed to—I would be in favour of it

1028. *Acting Chairman.*] Have you any notes on section eleven?—The present machinery provided is sufficient, except that the onus of issuing process should be on the claimant and not on the Court as at present, and that the claimant should be compelled to prosecute his claim within a fixed period. It was a former practice that no Court fees or stamp duty were payable on interpleaders in years gone by. Of course I am speaking of my experience. Some other magistrates in other districts might have had a different experience, and this is purely my own experience. Some years ago a Stamp Act was passed which provided for the stamping of summonses in different amounts, and specially included interpleader summonses; they cannot be issued now without the same Court fees and stamps being affixed as on an ordinary summons. A claimant writes to the Messenger claiming the goods attached in a suit, and it is the Messenger's duty to report it to the Magistrate or the Court, and the Clerk issues the interpleader summons. Then the difficulty comes in; there are no Court fees. The claimant says, "I do not see why I should pay these fees," and the Clerk says, "I cannot issue the summons without the fees being paid," and so the thing is very often hung up for a considerable time. Before this stamp duty was made payable summons used to be issued at once. What the Messenger did for his fees of service I could not say. The interpleader was then tried much more expeditiously than at present.

1029. *Mr. H. S. van Zyl.*] When was this alteration made?—I could not remember the date. It

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must have been somewhere in the eighties or early nineties.

1030. *Mr. Cronwright Schreiner.*] You do not know from your experience that the summonses are not drawn up by the Messenger? You do not know of the agents or attorneys doing it themselves? —If the claimant employs an attorney or an enrolled agent, I should think the attorney or agent does it, but I am talking of a claimant who prosecutes his own claim. I certainly think there should be some rule which would compel the claimant to prosecute his claim within a limited period. I am told in my office there are any amount of writs now hung up. I think it would also be a good thing if there was a time limit within which the claim must be prosecuted, so that a Magistrate should have the right to say, "If you do not prosecute your claim I shall order the goods to be sold." I did that once myself some years ago, but I should shrink from doing it again; I am not clear that the Magistrate has the power of doing that.

1031. *Mr. D. M. Brown.*] It has been stated here that there is an exception in the practice of Cape Town, namely, that it is done upon a bare letter here. Our experience everywhere else is that there has to be an affidavit?—I do not think the law provides for an affidavit.

1032. The practice provides for it?—I do not remember in any Court that I have been in that an affidavit has been required. I was in the Cape Town Court as Assistant Magistrate years before Mr. Wylde, whose name was mentioned in one of the questions put, and I do not think it was necessary then.

Monday, 15th November, 1909.

PRESENT :

The ATTORNEY-GENERAL (Chairman.)

Mr. H. S. van Zyl,	Mr. Oosthuisen,
Mr. D. M. Brown,	Mr. Michau.
Mr. Cronwright Schreiner.	

[In the absence of the Chairman, Mr. Cronwright Schreiner took the Chair.]

Mr. George Blackstone Williams, further examined.

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1033. *Acting Chairman.*] Have you anything further to say on section eleven?—I do not think so. I have a note in my memorandum to the effect that I see no necessity for any alteration in the law in regard to the matters dealt with by sections twelve, thirteen and fourteen.

1034. You see no necessity for these three clauses?—No.

1035. You think they are sufficiently provided for under the existing law?—I think so. With regard to sections fifteen, sixteen, seventeen and eighteen, I am not in favour of any alteration of the present law. I think it is better the law should remain that a man arrested under a decree of civil imprisonment and then discharged should not be put in again, but I take it if he has been discharged on his own request, on the promise of making payments, and then does not fulfil that promise, the law may be stretched to the extent of dealing with him. I mean to say, if the plaintiff consents, with the defendant agreeing to pay so much per week or month, that he may be discharged on the condition that if he does not keep up the payments he will be re-arrested, then that may be done.

1036. *Mr. H. S. van Zyl.*] That may be done now?—It has been done as a matter of practice, but I have heard doubt expressed as to its being

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legal. I do not know that the question has ever been decided in the Superior Courts.

1037. *Acting Chairman.*] Do you think it advisable to make provision for that?—As far as my experience goes the practice obtains, and I have never known any difficulty. Of course if a man is discharged by reason of the maintenance not being paid he cannot be put in prison again, and I think that is wise.

1038. *Mr. H. S. van Zyl.*] Do you know yourself of the case of a man being released and being re-arrested on not keeping his promise to pay?—I cannot remember a specific instance now, but I have no doubt I could put my hand on such a case.

1039. *Acting Chairman.*] The questions of costs against the debtor has been raised. Do you think or do you not think that in the case of a man who can pay and wilfully will not pay, all costs and maintenance should be given against him as well?—I would not go so far as saying he should pay for maintenance. At present if the withholding of the money is vexatious the Court can order costs of summons and so forth.

1040. If he can pay, why should he not pay maintenance? Why should the creditor be forced to incur expense in consequence of his refusal?—In that case a difficulty might arise in this way, that if a man were arrested on a debt and put in prison he might say, "Well, I have no money." If we could not find any of his money where would he get his food? It could not be at the expense of the Government, because there is no provision for the Government paying for his keep. It is quite possible he might have some money somewhere, but if it was not available immediately the result would be that unless the Government provided him with food he would starve; and we should in that way have the old scandal of imprisoning for debt that we read of in the old books.

1041. I take it the creditor would be liable to

pay the money and afterwards recover it?—It would be rather a complicated procedure, and I am in favour of leaving the matter as it is.

1042. I am not considering the case of a man who cannot pay at all?—If he cannot pay at all he should not be imprisoned, but unfortunately such a man does find his way there sometimes.

1043. I am considering the case of a man who the Bench may not know, but others know, can pay, in which case costs of maintenance could be given against him. Would you be in favour of that?—I should not object to the judgment creditor having a right of action, but I should make him liable in the first instance for the maintenance of a debtor.

[At this stage the Chairman entered the room, and Mr. Cronwright Schreiner vacated the Chair].

1044. *Mr. H. S. van Zyl.*] I suppose you have often found in the case of small debts that the original debt is doubled by the addition of the costs of proceedings for recovery and civil imprisonment?—Very often. It is a wonder to me that the parties so often proceed to civil imprisonment.

1045. And it will be worse if you add maintenance costs?—Very often some unfortunate debtor will be landed in the position of having a bill of costs of £5 to pay on perhaps a £1 debt.

1046. You are aware that the general tendency of modern feeling is rather in the direction of doing away with the procedure of civil imprisonment altogether?—Yes.

1047. Do you favour that?—I am strongly opposed to civil imprisonment myself if any substitute can be found for it. I have already stated, in regard to the suggestion of attaching portion of a man's wages, that I would be in favour of that if it would do away with civil imprisonment. I had not considered such a suggestion before it was put to me, but it struck me as being better to allow that, if you could thereby dispense with civil imprisonment.

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1048. *Mr. Oosthuisen.*] Is the provision not in effect now that a man often has to pay so much of his salary or wages under a decree of civil imprisonment?—No; it is not in force to-day. You can only touch what a man actually has. Mr. Brown's idea was that notice should be given to the employer, and if the man was earning, say, £2 a week the employer should be required to pay 10s. of that to the creditor, or into Court, and the man would receive the £1 10s.

1049. *Chairman.*] What observations have you to make with regard to section nineteen, on the subject of the attachment of movables for rent?—I think it is desirable the affidavit should be made before the Magistrate. The remark I have in my memorandum is, "I see no necessity for altering the present rule as to issue of orders for arrest of movables for rent in arrear. I think it desirable, especially as Court fees are involved, that affidavits, etc., should continue to be made before the Magistrate issuing the order."

1050. At present no attachment of movables for rent can be made before there is a summons issued?—Oh, yes; in a claim for rent the owner or landlord may come along and make an affidavit that the rent is seven days in arrear, and that it has been demanded and not paid, or he has reason to believe the goods are being, or about to be, removed for the purpose of evading execution, and so forth. It is upon that affidavit that the Magistrate issues an order for the attachment, under security that action will be taken within a certain time if necessary, and that applicant will pay costs if he fails in such action.

1051. The only point about this section, then, is substituting the Justice of the Peace?—Yes.

1052. And you do not think that is desirable?—I do not think it is desirable that the taking of an oath and the making of an affidavit should be made too easy for the public. To my mind, it is made too easy, and the consequence is that people are getting into the habit of making an affidavit

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as a matter of form without considering the solemnity of it at all.

1053. This would also make the Justice of the Peace the person to judge as to the value of the security?—Yes, but as a matter of practice that really would not make much difference, because it is very much a matter of form; in ninety-nine cases out of a hundred the surety is the attorney or agent acting for the person.

1054. *Mr. Cronwright Schreiner.*] It was put to us by a previous witness, with regard to the local practice, that very often a Magistrate was so occupied that he could not be got at, while the man was perhaps actually moving his furniture?—I do not know what other Magistrates do, but if a man gets up in my Court and tells me he has one of these urgent matters I put on one side for a couple of minutes whatever I may be doing. I do not know if all Magistrates do that. Some young men might be diffident about asking me, but I never refuse to hear such an application at once, if the matter is really urgent.

1055. *Chairman.*] With regard to section twenty, I see you say in your memorandum, "I am not in favour of this. A debtor should not be liable for costs before judgment is given against him." This section provides that after "such order" the words "and costs" shall be added?—Yes. The proposed amendment of the law provides that the Messenger shall attach a certain amount for costs. That would be before judgment. I am opposed to any man being made liable for costs before there is a judicial decision.

1056. The costs of course, which under this section, if it became law, would be added to the claim would only be the costs up to the time of attachment?—Yes.

1057. But you object to this man having costs added on to his debt at all?—It is possible the defendant might traverse the facts in the affidavit. He might state that the rent was not due.

1058. And in the end he might win?—Yes. If

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he says "I do not owe this money," or "It is not due yet,"—which sometimes does happen—the Messenger will say "I have nothing to do with that, and unless you pay the amount of costs I must attach." I do not think that should be possible.

1059. Do you know of an instance in the procedure of the Magistrate's Court, whether by law or practice, by which an attachment of goods under any circumstances is meant to include an attachment for costs?—Before judgment?

1060. Yes?—No; I do not remember any such case.

1061. I mean *interim* attachments pending suit?—This is the only *interim* attachment we have.

1062. *Mr. Cronwright-Schreiner.*] A man may say, "I will pay now," when you have attached his goods. Surely, there should be some penalty for his having forced you into that action?—You might have a right of action. On the other hand, consider the position of the tenant. Why should his goods be attached for costs in connection with a claim which, for all we know, may not be a correct one? He may say, "This rent is not due until to-morrow, but to save time and trouble, I will pay it now; but why should I pay the costs?" I am afraid that would be the effect of this section.

1063. *Mr. H. S. van Zyl.*] Certain costs would be incurred by the Messenger in going there?—This is a matter which is somewhat similar to civil imprisonment cases which we were discussing before, and there might be hardship to one party or the other, and you cannot always get out of it. I should prefer to leave it as it is. If you introduce this the debtor may suffer, or, on the other hand, the creditor may suffer. You cannot legislate for every individual case. On the whole, I would leave it where it is.

1064. *Chairman.*] In regard to section twenty-one, this is to be replaced by a new section?—I should leave the law as it is.

1065. Section twenty-two provides that there

should be no more law agents enrolled?—I do not see any necessity for altering the law, because at the present moment the Magistrate is precluded from enrolling an agent unless enrolled in some other district prior to Act 43 of 1885, in any district in which two attorneys are practising. It may be interesting if I relate my experience soon after going to Wynberg. When I went there between seven and eight years ago there were no attorneys actually practising in the district—within my interpretation of the word "practising," at at any rate—and then it came to be known that certain attorneys would shortly come into the district. In consequence of that there was an influx of young men coming to be enrolled as law agents. They were men of good character as far as was known, and I had to enroll them. Shortly afterwards two attorneys commenced practising in the district, and I had to stop the enrolling of agents. Of course these agents I speak of had no right of practising elsewhere.

1066. How many were enrolled there?—Within two months I daresay I enrolled eight or ten. I had no option but to do so. If the same state of affairs were likely to arise again I should not give the same answer, but I do not think it will arise again.

1067. *Mr. H. S. van Zyl.*] Do you think it is sufficient provision that where there are two attorneys no law agent can be enrolled?—I think so. I have very little experience of country districts, but I think on the whole it will be safe to leave the law as it is in that respect.

1068. *Mr. Oosthuisen.*] As I understand the clause, it is intended to raise the profession, and they do not want more agents enrolled. As a man of experience you would be able to tell the Committee if that would help the profession in that direction, and whether the number of law agents being enrolled indiscriminately as you stated might not have a contrary effect?—I do not think it made much difference to the

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profession, because the law agents have no right to do anything outside the Magistrate's Court which any other person cannot do. The only right a law agent has over a layman is that he can prepare a case and conduct it in Court, and be paid for it, but I do not know that he has any any other right over a layman.

1069. Do you think the interests of the public are as well safeguarded with a number of law agents as with attorneys only?—You are never likely to get a large number of law agents. As a witness here the other day said, they are a dying race. I am satisfied that there will soon be two attorneys of the Supreme Court in every district.

1070. Your opinion is that the law agents are dying out naturally?—Yes.

1071. *Mr. D. M. Brown.*] I suppose you know that when law agents were first admitted, in 1856, there was a scarcity of attorneys?—I believe there was a scarcity in the country districts thirty years ago, which is as far back as my experience goes.

1072. Do you think the standard of the persons applying for admission as law agents is quite equal to what the capacity of the present class of Magistrate demands?—A man can be an enrolled law agent without knowing anything about the law, and have to learn everything after he starts (in a district in which there are not two attorneys practising). All that is necessary is that he should be a man of good character, and he can be admitted.

1073. *Chairman.*] What have you to say on section twenty-three?—I have made the following remarks on sections twenty-three and twenty-four: "I see no necessity for such legislation. I take it the Superior Courts have ample power to deal with advocates and attorneys and persons falsely representing themselves as such. I remember no instance of any person falsely representing himself to be an enrolled agent. I am not aware that the latter has any rights or privileges beyond those of conducting cases in the Magistrates' Courts."

1074. *Mr. H. S. van Zyl.*] The existing law can deal with these people?—As far as I am aware; I presume they have that power.

1075. The law can deal with any one representing himself to be a fully qualified agent or attorney when he is not?—I do not know that the Magistrate could deal with a man who set up to be an enrolled agent, unless he was guilty of some offence, such as getting money under false pretences. He cannot pretend to be an enrolled agent of the Magistrate's Court, because if he comes into Court the Magistrate will not allow it, and outside the Court an enrolled agent has no special power by virtue of being such.

1076. *Chairman.*] Would not a person who acted in the way which is struck at by this section, and took money for it, be taking money under false pretences?—Yes, and I should issue a warrant for his apprehension if there were reasonable grounds for suspicion that he was obtaining money by false pretences.

1077. *Mr. D. M. Brown.*] It has been stated in evidence that there is a class of person enrolled, say at Wynberg, who practises in Cape Town with his name in large letters on the window, and down in one corner in small letters "Wynberg." Who is to put the law in motion in a case like that?—The aggrieved party would usually come to the nearest Magistrate or policeman if he had been swindled, and make a complaint. If a man is enrolled as a law agent in Wynberg, and gets £5 out of a man on the false statement that he is an agent enrolled in Cape Town, I should say he is guilty of a crime.

1078. But suppose no such statement is made, and a person goes in all good faith and has a letter of demand sent, and is charged 3s. 1d.?—I do not think it would be against the law to put up "Law Agent" on a brass plate, because there is no such thing. But if a man falsely calls himself "Enrolled Agent of the Magistrate's Court" and gets money out of a person by that, I say he is guilty of theft.

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1079. You might say it would be no offence if a man put up that he was a "Solicitor," because the correct term is "Attorney"?—By calling himself a solicitor he would be representing that he was an attorney.

1080. But if he puts up that he is a law agent, is not that representing himself to be an enrolled law agent?—Possibly. At the same time, I do not think there is any necessity for any legislation. I do not wish to express any opinion on the matter of practitioners in partnership.

1081. *Chairman.*] Section twenty-five has been amended, so as to give the Supreme Court the control of these people?—I do not know that there is any necessity for that. Of course I do not know what goes on out of Court, but I may say it is very seldom I have any complaints made to me of the conduct of a practitioner. For instance, I do not think I have had one such case during the twelve months I have been Magistrate of Cape Town. There have been complaints in the past. If I get a complaint against an enrolled law agent I usually write for an explanation, and the matter is usually settled up. The nature of the complaint generally is that some money has been collected and there is some difficulty in getting it out, but a letter from the Magistrate usually produces it, and there the matter will drop. In the whole course of my experience I have only known personally of one law agent being suspended, which was by my chief in another district.

1082. You have never suspended one yourself?—No.

1083. Nor struck one off the rolls?—No.

1084. *Mr. Cronwright Schreiner.*] You would leave this matter as it is at present?—Yes.

1085. *Mr. H. S. van Zyl.*] In the case of serious misconduct do you think even there the Magistrate is the proper person to try the case, rather than have it referred to a higher Court?—If it comes to serious misconduct on the part of a law agent, I think you will usually find it will come

within the four corners of the criminal law. I have known cases, of course, where that has happened.

1086. *Chairman.*] And then they have been proceeded against in the ordinary way?—Yes, and been struck off the rolls.

1087. *Mr. H. S. van Zyl.*] If the law agent is found guilty of a crime, he is struck off the roll?—Yes, if it is a serious crime—involving dishonesty or great depravity—he will be struck off. With regard to section twenty-six, I see there is a new section proposed to be substituted.

1088. Is not the first part of that amended section, contained in the first six lines, the law today?—I think it is law. The remarks I put in my memorandum were before I knew of the amendment to the section as appearing in the Bill.

1089. *Chairman.*] Were you in favour of the provisions of section twenty-six as originally drafted?—I was. The section was rather involved, because it implied the repeal of section seven of Act No. 21 of 1876, and I made the following note on this, "I am in favour of the provisions of this section. The fees for practitioners laid down in 1856 might not be applicable for all time." I might remark that there is a section in Act No. 20 of 1856 which excludes a practitioner from recovering more than 10s. 6d for one appearance under any circumstances. I made another remark upon the original section, "It would appear, however, that if section seven of Act No. 21 of 1876 is wholly repealed the Judges will lose their power of making rules *re* witness expenses, etc. The proposed new section should therefore be amended in this direction." Of course the section which it is now proposed to insert does not repeal anything, and my remark on the point becomes irrelevant.

1090. *Mr. D. M. Brown.*] The sections repealed under the new section twenty-six repeal the old fees, and there must be provision for making another tariff?—I do not think that is so, because the Judges have made the tariff under a subsequent Act.

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1091. *Chairman.*] I take it to be your view that you favour provisions by which an increased tariff of fees might be made possible?—Yes.

1092. Because you think the scale of fees laid down in 1856 is not applicable now?—It is not that it is not applicable. There was a tariff made by the Judges since then, but there is one section in Act No. 20 of 1856 which regulates the fee for appearance in Court, and in no case can it exceed 10s. 6d. per diem. I do not say it is desirable that that fee should be raised, but I think the Supreme Court should have power to raise it. With regard to section twenty-seven, I think the proposal regarding the fee of an advocate is a reasonable one. I think the present fee is limited to one guinea. I think section twenty-eight is unnecessary. The present legislation and Rules of Court provide all that is necessary in this respect. With regard to section twenty-nine I say, "I see no reason for extending the period within which a person may appeal in criminal cases—at present four days—but if any alteration is made there should be some reference in the section to section four of Act No. 21 of 1876." That is the original Act which provides for an appeal.

1093. You see no reason for extending the period?—No.

1094. Is not the time very short?—I am not very keen about it one way or the other. It certainly has happened sometimes that a person had missed the chance of appealing. It happened the other day, but I am quite sure no hardship was caused in that particular case. The man noted his appeal several days after conviction, and I told him he was too late.

1095. *Mr. D. M. Brown.*] A man might want to get Counsel's opinion before noting his appeal?—I think, on further consideration, that I would rather have an extended time, for this reason, now Mr. Brown mentions it. A man might note an appeal within four days, so as to keep his chance to go to the Superior Court open. That might

entail a lot of clerical labour by the magistrate's clerks in copying evidence and so forth, which might be found to be of no use whatever if the man withdrew his appeal. If the time were extended to seven days there might be some saving in that respect. I never thought of it in that light before. I am undoubtedly opposed to the provisions of section thirty, from every point of view.

1096. *Mr. Cronwright Schreiner.*] Would you be prepared to allow a man to attach to the record a statement of his case?—In a preparatory examination that is always done. When a Magistrate commits a man, whether he has given evidence or not, before committing him he asks if he wishes to say anything, at the same time cautioning him that he need say nothing to incriminate himself, whilst anything he says may be used as evidence against him.

1097. *Mr. D. M. Brown.*] Would you not have a clause for working as they have done in England, I believe, namely, that if he wished to be tried by jury he should give reasons for it; would you not give the option of making a request for a jury or otherwise, the reasons to be stated?—I think I should leave it where it is.

1098. Do you think it is in the interests of public morality that cases of bestiality, abortion, rape and so on should be tried openly?—I have often wished I could clear my Court. Of course, I hold I may do so in a preliminary examination, because any Justice of the Peace can hold one in his private dining-room.

1099. *Chairman.*] You realize that there is a very important principle involved in the right of the public to be in Court?—Yes. I have known of shocking cases I have had to try, where I have suggested to white women that they should retire, and they have refused. In the case of children, whether the law allows it or not, I tell the policemen to turn them out during the hearing of such a case.

1100. Were not administration circulars sent out

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to Magistrates in regard to trying cases where juveniles were concerned, and so on?—Yes. Since I have been in Cape Town I have not taken many cases like that where such instructions could be applied, but they have been carried out at times. It was certainly done in Wynberg. What was requested was that children or women should be tried first, as soon as the Court sat, or else at the conclusion of all other cases. In the case of an old, hardened offender, who has been up a great many times, I have not troubled, but in the case of a woman who has any pretensions to respectability, that rule is carried out as far as possible.

1101. Take sections thirty-one, thirty-two and thirty-three together?—My memorandum reads, "No good reason, in my opinion, exists for amplifying the powers that the Court has at present of obtaining evidence of witnesses resident in another district, who it is not considered expedient, for reason of distance, expense, etc., should attend in person, viz., by interrogatories." I am opposed to the idea of commissions, chiefly on the ground of expense. There would be a good deal of expense. Of course interrogatories are not always satisfactory, because the Magistrate having to make the the decision does not see the witnesses, but of course that would also apply in the case of a commission. I think the simpler the procedure remains, the better for the public, and the cheaper.

1102. *Mr. Cronwright Schreiner.*] You would favour a person who could not attend the Court having his evidence taken by interrogatories?—As a matter of fact, it is frequently done by the consent of parties.

1103. You would not give the Magistrate discretionary power?—He might have discretionary power to order it, but I do not think it is worth while altering the law. I am not opposed to that in the case of illness, or anything of that sort.

1104. You would not object to the Magistrate going to the place, where the person is within the jurisdiction, if possible?—Certainly not, in the

case of illness. It is sometimes done by consent of parties. Mr. G. B. Williams. Nov, 15, 1909.

1105. Would you be opposed to authorising another Magistrate to take evidence in a far district and send you that evidence on commission? —It seems to be unnecessarily elaborating the procedure. I do not see that you get much benefit from it.

1106. Your whole practice has been confined to large centres?—Yes.

1107. You can conceive that might be a useful provision in country districts. Supposing I have a case at Richmond, and want the evidence of a man at Prieska, there would be no objection to authorising the Magistrate to take that evidence on commission and send it to me?—Why would not interrogatories do?

1108. They are not always satisfactory?—I do not understand how far commissions are more satisfactory, except that they give more scope for cross-examination.

1109. That is the point. Interrogatories mean written questions and written answers, but the Magistrate would do as you would in your Court and then send you all the evidence?—That is the same as a commission, because the Magistrate at Prieska would not communicate with the Magistrate at Richmond and say, "From that man's demeanour he was speaking the truth, and I believe from the other man's demeanour he was not speaking the truth." So I do not see it would help you much. I have a strong objection on the score of expense; I think it would mean the employment of two other legal practitioners.

1110. Interrogatories usually mean that up-country?—They do not here.

1111. Assuming what I say represents the true state of affairs, you would have no strong objection to it?—No. It is principally on the score of expense and too much elaboration that I object.

1112. *Mr. H. S. van Zyl.*] Do you not think a commission would be a rather more satisfactory

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mode of taking evidence than through interrogatories?—I do not see any very great benefit myself. I like to see the witness face to face, and you cannot do that if you have the evidence taken on a commission.

1113. If you cannot do it, would it not be better to have a commissioner rather than interrogatories?—It might be better, but I doubt if the extra benefit would be commensurate with the extra expense, which I think is the chief matter of consideration.

1114. Why should a commission be more expensive than interrogatories?—With interrogatories there is no reason for the attendance of an agent or attorney. For instance, when witnesses receive interrogatories from up-country they come to my office, and the Clerk reads over the questions to the witness and records his answers; they are then sworn before me.

1115. *Mr. D. M. Brown.*] The Magistrate has the discretion and is better able to judge?—I may state, to my own knowledge, that this practice exists in the Transvaal, and possibly other Colonies, because at the present moment I have a commission on my table to take evidence for a Transvaal Magistrate.

1116. *Chairman.*] Is not that because it is a different Colony?—I could not send a commission to the Transvaal. They have special legislation there for doing this.

1117. And also within the borders of the Colony?—I have turned up the Proclamation—which is one of Lord Milner's—and it does not say whether the commission refers to persons residing in or beyond the boundaries of the Colony.

1118. *Mr. D. M. Brown.*] Would it not be better to give the power to the Magistrate?—I am afraid it might be used unnecessarily; there might be some unwillingness to refuse it.

1119. *Chairman.*] Have you any observations to make on the Schedule?—I have made the following note, in reference to sections one, two,

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three, four and five, "The practice that obtains in Cape Town is that if a case is disputed it is not heard on the return day of the summons but is postponed to some later date. This practice works well here, but I doubt if it would be suitable to Resident Magistrates' Courts in which the business is not so great. It is certainly advisable in many instances that a plea should be filed some time before the actual hearing, and I would recommend legislation somewhat on the lines of section seven of the repealed Griqualand West Ordinance No. 13 of 1874, as follows: 'When a defendant pleads specially or excepts or files any plea other than the general issue, such special pleas or exceptions shall be filed with the Clerk of the Court of Resident Magistrate wherein the case is to be tried, not later than 2 o'clock p.m. on the day preceding the return day of the summons.' I would, however, add that such a plea, etc., should also be served upon plaintiff or his attorney." I may say I had some experience of Ordinance No. 13 of 1874 before it was repealed, and when this was brought to my notice that old Ordinance at once suggested itself to my recollection.

1120. Did you find it work satisfactorily?—I think so. I certainly think it is advisable, especially where there is a lot of work in the Court, that a plea should be filed some time before. You may have five or six cases where you are not embarrassed at all, but sometimes you are embarrassed by having a complicated plea sprung upon you; not only may the attorney for the plaintiff be embarrassed, but the Magistrate himself. I always endeavour, of course, to make the procedure as easy as possible. If any alteration is made in the law requiring the filing of a plea, the form of summons must be altered to meet it, because it is quite conceivable a person might not be in a financial position to employ an attorney or agent who would tell him the procedure, and he might thereby be placed entirely at a disadvantage.

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1121. *Mr. Cronwright Schreiner.*] This would not do up-country where the people come long distances?—I say that I doubt if it would be applicable all over the country.

1122. *Chairman.*] Do you think the plea of general issue should be retained?—Act No. 20 of 1856 says the summons shall be read over to the defendant, and the defendant shall be asked if he admits or denies the debt. But I speak with all humility on the point, because the Supreme Court has laid down in certain cases that there must be special pleas. Act No. 20 of 1856 merely says that the Clerk shall read the plaint or the summons to the defendant, and ask if he admit or denies the debt.

1123. *Mr. Cronwright Schreiner.*] You often hear people say, "I deny the debt and plead general issue?"—That often occurs. With regard to section six of the Schedule, I do not think there should be any alteration of the law as regards interest. In regard to sections seven and eight, I approve of the seven days limit. The Magistrate's Court, of Cape Town, sits almost daily, and there is sometimes confusion as to what is meant by the "next Court day" in the rule. But I see no reason for altering the rule further. With regard to section nine, there is no necessity for alteration.

1124. *Mr. H. S. van Zyl.*] With reference to section seven of the Schedule, do you not think it is desirable the Magistrate should give his reasons for the judgment, within a very short space of time after an appeal has been noted?—He does now. You mean he should be compelled to give his reasons at once?

1125. Yes, because if the appellant knows the Magistrate's reasons he may not go on with his case. A man notes his appeal and then asks counsel's opinion upon the case, and perhaps counsel has not the benefit of the Magistrate's reasons?—I tell you what I do, as a matter of practice. If an appeal is noted against my judgment I do not worry myself about it for the first

fourteen days, because an appeal is often noted and nothing further done. If an attorney comes along after the appeal has been noted, and asks for the reasons, I give them to him at once.

1126. You do think it is desirable, if the case is to be submitted for an opinion, that the Magistrate's reasons should be given?—I have nothing to do with appellant's counsel. I am perfectly prepared to give my reasons as soon as the appellant asks for them, although, of course, some Magistrates say their reasons are for the Supreme Court. I always give them if they are wanted, and give the appellant every chance.

1127. Many a case would not go to appeal if the Magistrate's reasons were stated?—My practice is to give them as soon as possible afterwards if required.

1128. Do you think it is desirable they should be given as soon as possible afterwards?—It would be desirable, and I cannot conceive a Magistrate not giving them when necessary, although of course I have heard it said that the Magistrate's reasons are for the Supreme Court and no one else. I do not take that view myself.

1129. *Mr. D. M. Brown.*] You are favourable to the reasons being given?—Yes. I have not the least objection to the appellant having the reasons. I have been asked by another Magistrate to state that it might be desirable that there should be a limit within which a civil appeal should be prosecuted before the Supreme Court. As a matter of fact, I do not think there is any limit now for civil appeals. Criminal appeals must be within forty-two days.

1130. *Chairman.*] I see you have no objection to section eleven as originally drafted, but that has been deleted and a new section substituted?—I would make the period longer than three days, because very often there is a very long record, and perhaps a lot of exhibits, to copy.

1131. Do you think ten days would be a better period to fix?—Yes. I think ten days should be

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inserted instead of four, and then lower down in the section you will have to make it fourteen days instead of seven.

1132. And then it provides that the appeal must be prosecuted within three months?—That meets the suggestion I was making.

1133. *Mr. D. M. Brown.*] Supposing you have to take a case to a Circuit Court, it might be necessary to have that period fixed as the next Circuit Court or within three months?—That may be necessary. I was thinking of the Supreme Court. I have no experience of Circuit Courts.

Friday, 19th November, 1909.

PRESENT:

THE ATTORNEY-GENERAL (Chairman).

Mr. Upington.	Mr. Oosthuisen.
Mr. H. S. van Zyl.	Mr. Louw.
Mr. Wessels.	Mr. Michau.
Mr. D. M. Brown.	Mr. C. J. Krige.

[In the absence of the Chairman, Mr. C. J. Krige took the chair.]

Mr. George James Boyes, examined.

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1134. *Acting Chairman.*] You are the Resident Magistrate of Simon's Town?—Yes; and also Collector of Customs, Port Captain, and numerous other things there.

1135. Had you had experience in this country as a Magistrate before you went to Simon's Town?—Yes. I was five years at Mafeking, four and a half years at Richmond, one year at Victoria West, and two years at Piquetberg. Prior to holding a full Magisterial appointment I was Clerk at Umtata for three years; Assistant Magistrate at Riversdale; Clerk in the Colonial Office, Cape Town; Assistant Magistrate of Bedford; Registrar under Judge Solomon at Kimberley; Assistant Magistrate and Chief Clerk at Vryburg; and then Acting Magistrate.

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1136. From your experience as a Magistrate you must be well conversant with the Magistrates' Court Act of 1856?—Yes. I may add that I passed the Civil Service Lower Law Examination, the Examination in Law and Jurisprudence, the Civil Service Preliminary LL.B., and the Civil Service Higher Law Examination.

1137. Are you of opinion as a Magistrate that the Magistrates' Court Act of 1856, as amended by subsequent Acts, requires further amending?—Yes, I think it does.

1138. Have you read the present Bill before the House?—Yes.

1139. Are there any clauses upon which you wish to give your views to the Committee?—Yes. I will take the clauses seriatim. Clauses One, Two and Three are formal, and there does not appear to be any special objection to those clauses. With regard to Clause Four, I am of opinion that there is no special necessity for this clause. There are a number of decided cases dealing with the words "person residing" in section eight of Act 20 of 1856. I will quote these and give a short epitome of the points decided. First there is the case of *Maarat* v. *Hickson & Co.* (12 Supreme Court Reports, page 448). Hickson & Co., residing in the district of Cape Town, sued Maarat, residing at Wynberg, and in default of his appearance obtained provisional judgment against him in the Magistrate's Court at Wynberg. Maarat, wishing to re-open the case, took out a summons at Wynberg, and this was served on Hickson & Co. at Cape Town by the Messenger of the R.M.'s Court, Cape Town. Hickson & Co. excepted, as they lived at Cape Town. Held that as Hickson & Co. had chosen Wynberg as the forum, that Court was the only Court that could re-open the case. *Harris* v. *Blore* (1 Juta, page 41). Decided that if a party to a suit who resides outside the jurisdiction in which the suit is heard, admits to or confesses judgment, this fact will not give the Magistrate jurisdiction. *Beedle & Co.* v. *Bowley* (12 Supreme Court Reports,

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page 401). Decided that the Magistrate of the district where a person has his house or abides has jurisdiction over him, and not the Magistrate where the defendant carries on his business; but "residing" when applied to a Corporation or a Company would no doubt have a technical meaning, for the simple reason that the ordinary and popular reading would be wholly inapplicable. When it is said of an individual that he "resides" at a place, it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done. *Scott v. Clarke & Co.* (13 Supreme Court Reports, 15.) Decided that a person trading in Cape Town, but residing at Rondebosch, must be sued before Wynberg Court, and not Cape Town. If Clarke & Co. were a Corporation they could be sued in Cape Town. *Oosthuysen v. Pienaar* (14 Supreme Court Reports, 373.) Decided that a person living at Colesberg, and going occasionally to Johannesburg, came under the jurisdiction of the Magistrate of Colesberg. *Lotter v. Solomon* (19 Cape Law Journal, 282.) Held that defendant, who during the war took refuge in the Colony, could not be sued before the Resident Magistrate's Court for debt incurred in the Transvaal. Held that he did not reside in the Colony. *Cousins & Preston v. Assignees of Estate of Phillips* (23 Supreme Court Reports, page 272.) Phillips, who carried on business in the district of Mount Fletcher, assigned his estate to M., who resided in East London. The plaintiffs, having a claim against the assigned estate, sued M. as assignee in the Mount Fletcher Court. Held that the Magistrate had no jurisdiction, as M. resided at East London and should be sued before the Magistrate of East London. *Stoffels v. Adams* (24 Supreme Court Reports, page 701.) Plaintiff residing at Umtata, sued defendant in Magistrate's Court at Lusikisiki. Defendant counter-claimed. Plaintiff accepted, as he resided at Umtata. Held that, as plaintiff had submitted to jurisdiction of Magistrate of Lusiki-

siki, that Magistrate had jurisdiction to decide counter-claim. *Zeederberg & Duncan v. Hofmeyr, Du Toit & Co.* (25 Supreme Court Reports, page 413.) Plaintiff, who resided at Wynberg and carried on business at Cape Town, sued defendants, who had carried on business at Cape Town, and one of whom now resided at Paarl, in Supreme Court for £15, balance of promissory note. Held that provisional sentence must be granted with costs on Supreme Court scale. The decisions which I have quoted make the position of the present law very clear. A person has to be sued where he abides, has his house and sleeps. A Corporation or other corporate body or Company is domiciled where the business is carried on, and the Resident Magistrate of that district has jurisdiction. With regard to partnership, the Court where partners live or have their homes has jurisdiction. A difficulty does arise if partners reside in different districts. The Supreme Court is then the proper Court. As far as I can see that is the only difficulty. The question then is, is it necessary on account of this one difficulty to alter our present law? I am of opinion that it is not necessary, and suggest that section four be deleted. I am of opinion that the jurisdiction of Magistrates should be such that when persons carry on business within the district of a Resident Magistrate, that Resident Magistrate should have jurisdiction over any action arising in connection with such business.

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1140. The object of this clause is to give the plaintiff the right either to sue the defendant at his place of residence or at his place of business?—I did not take it to mean that from the wording of the clause. When you have the law definitely laying down the position, why do you want to alter it? If it is an individual you sue him at his place of residence; if it is a registered Company you sue those people at the place of business; and if it is an ordinary partnership outside a Company you sue the partners in the districts where they reside.

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The only difficulty I see is where partners reside in two districts who are carrying on business in Cape Town, the one residing at Rondebosch and the other at Woodstock, for instance. Then there is a difficulty; you would have to sue those parties in the Supreme Court.

1141.—If it is the intention of the clause to enable a person to be sued either at his place of residence or his place of business, do you think it is a move in the right direction?—I cannot see that the clause means that.

1142. *Mr. Michau.*] Do you not think, if that is the object of the clause, there would be the objection that a defendant could then be sued on the same day before two different Courts?—That would be a strong objection; still I do not see that this section gives you that power. I should like to be clear what the meaning of the section is before I give my evidence on that point.

1143. If it does mean what I have said, do you agree that it is objectionable?—Yes, but I do not think it does mean that. It is already laid down so clearly in the decisions I have quoted where you can sue a man, and the only case where I am not clear is where partners live in different districts.

1144. This does not affect the country districts so much; it was a point raised by the attorneys and enrolled agents of Uitenhage as affecting places like Uitenhage, Port Elizabeth and Cape Town?—There is no grievance in the Cape Division, as the present law is so clear.

1145. If the defendant is a man carrying on business in Cape Town, but who lives in Wynberg, then the plaintiff, who may be a Cape Town merchant, for instance, has to go to Wynberg with all his books, whereas if the defendant were living in Cape Town, he would simply take the case to the Court in Cape Town. Is it not a grievance that should be redressed that he should have to go to Wynberg?—I do not know. And you have converse cases. So far the procedure

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has worked very satisfactorily. My opinion is that the law as it is now—and I have given you all the cases bearing on that point—makes the position quite clear.

1146. You must sue a man where he resides; that is admitted. But the object of this Bill is to alter that law and to give the plaintiff the right to sue either at the place of residence or at the place of business. Therefore, if I reside at Rondebosch and carry on business at Cape Town, I could be sued at both places on the same day. I find that at a meeting of attorneys and enrolled agents practising at Uitenhage a resolution was passed to the following effect: "That Clause Four of the proposed Bill be deleted on the following grounds: First, that such a dual residence for a debtor may both confuse and greatly prejudice him, inasmuch as it is open for his being summoned to appear in two Courts on the same day (as applying more especially in the cases of Uitenhage and Port Elizabeth, and Cape Town and its suburbs.) Second, that the practice of the present, and one of over 50 years' standing, has not prejudiced the creditor in any way, whereas the contemplated measure may materially prejudice and hamper the debtor." Do you agree with that?—Yes.

1147. *Mr. Louw.*] I do not see how a man could be sued at two different places on the same day, because he could not be sued in Cape Town if he lived at Wynberg?—According to what Mr. Krige says, the present proposed section gives the plaintiff the right of suing the defendant either at Cape Town or at Wynberg if his business is at Cape Town and he lives at Wynberg; the present section means that he can be sued in either place.

1148. *Mr. Brown.*] You would amend the law as far as partners are concerned and put them on the same footing as Corporations?—Yes; the present position is unsatisfactory where partners live in different districts.

1149. Have you in your experience found many cases of persons having two summonses in one day?—Yes, often.

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1150. *Acting Chairman.*] What is your opinion with regard to Clause Five?—The only reason that I can see for this section is that after judgment the defendant may remove to another district. Provision is made in our present law for a Magistrate sending a writ to the Resident Magistrate of a district to which the defendant has removed or where he has property. After the writ has been endorsed by the Resident Magistrate where the property is situated, it can be executed and the property attached, just as if that Magistrate had given judgment. There is this difficulty, that if any plaintiff wishes to sue for civil imprisonment when the defendant has removed to another district, he has to go to the Supreme Court, get provisional judgment on the Magistrate's judgment, and after a return of *nulla bona* get an order for civil imprisonment. This section No. five does not make this position at all clear. I am of opinion that when a case is commenced in a Resident Magistrate's Court, that Court ought to have the power to carry it to a final issue, and that provision should be made that in the event of a defendant, after a case has been commenced against him, removing to another district, he should still be liable to the Court where the case was begun, and provision should be made for the Magistrate of the district where he has removed endorsing any summons or process of the original Court, just as Magistrates now do in cases of writs and subpœnas for witnesses. I agree with the principle contained in section five, but to carry the principle into practical effect, provision, as I have stated, for endorsement of all process should be made. While on the subject of summonses, I should like to urge the Attorney-General to insert a new section in this Act dealing with criminal summonses. As the law now stands there is no provision for a Magistrate to endorse a criminal summons to appear in another district. This is clearly a *casus omissus*, and should be remedied. Provision is made for endorsing criminal and civil

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subpœnas and writs, but not for summonses in criminal cases. Now, the only way to get a person before the Court where the crime has been committed, and which is the only Court which has jurisdiction if the defendant or accused is out of that district, is for the Magistrate to issue a warrant of arrest for the accused person, who can then be sent under arrest to the Resident Magistrate having jurisdiction, or admitted to bail to appear before that Magistrate. This procedure is often necessarily harsh and is against the dictum of the Chief Justice, who has laid down that accused persons are not to be arrested for minor offences unless for very good cause. I suggest that the Attorney-General, who is on this Select Committee, draft a clause to meet this point. As I say, the present law is, if you want to bring before the Magistrate a man who commits an offence in one district and goes to another, you cannot get him before the Court of the district in which he committed the offence without issuing a warrant and having him arrested.

1151. *Mr. Michau.*] The Magistrate can summon a man to appear before him for committing some offence, and if that person does not appear he can issue a warrant for his arrest; then when the man comes before him he can fine him, but not detain him?—You can fine him, but you cannot as an alternative imprison him. Under our present law you cannot summon a man in another district, and consequently you cannot make him liable for not carrying out an order which you have no authority to issue.

1152. A person committing an offence is summoned to appear before you, and he does not appear————?—There is no reason why he should appear.

1153. You summon him to appear and he does not appear; you then issue a warrant and arrest him?—No, you cannot do that. The procedure to get a summons is to go and lay a complaint before the Magistrate's Clerk and a summons is issued;

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but in order to get a warrant you must make an affidavit and sworn declaration.

1154. When a man is summoned to appear and does not appear, what do you do?—An affidavit must be taken.

1155. After that is taken you can then fine him up to £10?—For what?

1156. For contempt of Court?—No, there is no contempt.

1157. He did not obey the summons?—The law does not allow you to issue a summons.

1158. I am referring to a case of an offence committed within the Magistrate's own jurisdiction?—I misunderstood you. I thought you referred to the case of a man who moved to another district. In the case you refer to there is no question about the procedure.

1159. If a man does not obey the summons, you then have him brought before you and have power to fine him up to £10 for contempt of Court, but you have not got power to imprison him?—You can fine him £5, and under Ordinance No. 6 of 1839 you can sentence him up to three months' imprisonment. But you cannot sentence him straight away. The Supreme Court held that, in a case where a man was fined £5 or seven days' imprisonment, the Magistrate had not got that right. The procedure which the law provides is to issue a writ of attachment of the property, and if a *nulla bona* return is made you can then make an order for civil imprisonment. Our law does not provide for civil imprisonment if a man moves out of the district; that is in civil cases. You cannot issue a summons for that. I see that there is an amended section, which meets the case I have raised.

1160. *Mr. Upington.*] Do you approve of new section five?—Yes; that meets the difficulty I have raised.

1161. It may meet the difficulty you have raised, but do you approve of that section?—I approve of that, as it makes provision for what provision is not now made in our law.

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1162. I suggest that the greatest hardship and injustice may be done to a debtor under that section?—How?

1163. Take the case of a man who cannot pay. He goes away from the district where judgment has been obtained against him to the other end of the country. Down swoops the creditor on him there. The writ comes down on him with a writ of civil imprisonment straight off?—No, he gets a summons to appear.

1164. The objection to section five, I put it to you, is this. You serve the summons in the district where the debtor resides, where he has moved to, which may be, in a country like this, 800 or 900 miles away. *Ex hypothesi* he is a man who has failed to pay a small debt. The summons calls on him to appear in a Court 800 or 900 miles away to show cause why he should not be civilly imprisoned. Is that not ridiculous? Where is the man to get funds to go all that distance?—He can send a power of attorney if he wishes to appear. You have put an extraordinary case. Take the converse case. You have many persons who slip away simply in order to avoid paying their debts.

1165. *Mr. Brown.*] What would you say to having a limit of say 25 miles or some reasonable limit, to meet cases such as the Cape Peninsula?—A limit of that kind would be satisfactory. It would not, however, do away with the difficulty in the case of a man going say 600 miles away.

1166. *Acting Chairman.*] What is your opinion with regard to section six?—With regard to sub-section (1) of section six, I presume this is to allow the Magistrates having jurisdiction on mortgage bonds up to £250, and on judgments from other States. Under section eight, sub-section (1), of Act 20 of 1856, Magistrates have jurisdiction up to £40 in all liquid cases, including mortgage bonds, but when that jurisdiction was extended to £100 under section three of Act 21 of 1876. mortgage bonds were specially excluded. There must have been some special reason for that exception. Now, if

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this section as drafted becomes law, and judgment is obtained on a mortgage bond, what use will that judgment be? Waste of money, as the Magistrate has no power to attach the landed property mortgaged The plaintiff, although he obtains his judgment for the amount of the bond from the Magistrate, will still have to apply to the Supreme Court for an order to attach the landed property which has been mortgaged. I am of opinion that sub-section (1) of section six should be deleted, and that sub-section (*a*) of section five of Act 43 of 1885 remain as it is. I really cannot see any reason for the proposed alteration. And I may say further that the Supreme Court has very often great difficulty in deciding which is a case in which they can give provisional judgment.

1167. The object of this sub-section is really to give the Magistrate jurisdiction in the case of a foreign judgment?—What is the use of that now that we are going into union? If you pass that section as laid down here, a Magistrate will be able to give judgment on a mortgage bond, but, as I have already pointed out, it will be a waste of time. At present a Magistrate cannot give judgment on a mortgage bond.

1168. Cannot the Magistrate give judgment for interest?—Yes; and with regard to the bond itself, before Act 21 of 1876 was passed a Magistrate could give judgment on a mortgage bond up to £40, but subsequent to the passing of that Act, although the jurisdiction was increased, mortgage bonds were specially excluded. If this sub-section is only to apply to foreign judgments I see no reason for its enactment. I also say a Magistrate cannot give judgment on a mortgage bond, and if he could it would be no use. There would also very often be a great difficulty in deciding whether a case was one in which provisional judgment would be given in the Supreme Court. With regard to interest, a Magistrate can give judgment.

1169. *Mr. Wessels.*] Would you extend the jurisdiction of the Magistrate in regard to bonds of up

to £250; what is your opinion with regard to that being done?—If you do that I think you certainly ought to increase the legal qualifications of Magistrates, and increase their emoluments,

1170. A mortgage bond is a liquid debt. It is a document which has gone through the Deeds Office; surely you do not want to raise the status of your Magistrate to allow him to give such a judgment?—It is a very great responsibility for a man to go and give orders to attach landed property.

1171. The debtor acknowledges that he owes say £25, and he gives a property as security. Supposing you have a case of a small mortgage bond, say for £50; you know that practically the whole value of the property given as security is swallowed up in the costly procedure involved in going to the Supreme Court?—You have no costly procedure in the Supreme Court. You simply get provisional judgment, then put your papers through your attorney and get transfer.

1172. You do not quite follow me. I am putting the case of a man who has to sue on a small bond. You know that considerable cost is incurred. It has to go through the High Sheriff, and you know that the procedure is very costly. Would you not discriminate between bonds up to a certain amount so as to come to the assistance of people who hold those small bonds, and so as to prevent the whole of the property being swallowed up in Supreme Court costs?—There must have been some good reason on the part of the Legislature when they passed the amending Act, No. 21 of 1876, in which they increased the Magisterial jurisdiction up to £100 in liquid cases, but specially excluded mortgage bonds. What the reason was I do not know, but there must have been some strong reason for it. I think, taking the country and the jurisdiction generally, it is wise to leave all questions of landed property to the judgment of the Supreme Court.

1173. Your answer is that, irrespective of the

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amount involved in a bond, you would not be in favour of increasing the Magistrate's jurisdiction in that direction; whether the amount be £25 or £50, you say leave it as it is at present?—Yes, I am not in favour of any alteration of that jurisdiction.

1174. *Acting Chairman.*] You mean as regards sub-section one?—Yes. If you read the beginning of Menzies' Reports, No. 1, you will see it laid down on what grounds provisional judgment can be given, and you will see it is very involved.

1175. *Mr. Wessels.*] Has a case ever come to your notice where a small bond-holder has had to go to the Supreme Court, and the man has had to leave it alone for fear of all the cost he would have to incur?—I do not know that the costs are so great.

1176. I can tell you it is very expensive?—It is not the Supreme Court costs; it is the subsequent costs. And you would have the same subsequent costs in the Resident Magistrate's Court.

1177. My idea is to simplify the machinery considerably. At present you have to go through so many channels, and it all means expense: whereas if you limit the amount to £250 within the jurisdiction of the Magistrate's Court it will greatly simplify the machinery?—There is not as much difficulty in getting your provisional judgment in the Supreme Court as there would be in getting it in the Magistrate's Court; and the subsequent procedure would be the same, the only difference being that in the Supreme Court the Sheriff attaches the property, whereas in the Resident Magistrate's Court the Messenger would do it.

1178. *Mr. Brown.*] You are of opinion, that immovable property should only be dealt with by the Supreme Court?—Yes, as the Magistrate's Court is at present constituted.

1179. *Acting Chairman.*] What do you say with regard to sub-section (2)?—I am in favour of increasing the jurisdiction of Magistrates from £20 to £50 in all cases, but if this is done it will increase the work of the Magistrates very con-

siderably, and consequently lessen the work of the Higher Courts. If the work and jurisdiction of the Magistrates should be increased, the legal qualifications and the emoluments of the Magistrates should in all fairness to litigants and the Magistrates be increased accordingly. I do not think that it is fully realized that, if the Magistrate's jurisdiction be increased as suggested, he might be called upon to adjudicate between two parties to the amount of £850. I will give you a possible case. Plaintiff sues on a promissory note for £250. Defendant counter-claims against this for £250 damages for breach of contract. That is £500 in dispute. Plaintiff further claims £100, purchase price of some movables. Defendant counter-claims for £100, damages for assault. Plaintiff claims £50 for seduction. Defendant counter-claims £50 for sale of jewellery. Plaintiff claims order for ejectment up to £50. This shows that in one case between plaintiff and defendant a Magistrate may have to adjudicate upon amounts totalling to £850, and upon most intricate and complicated questions of law and fact. What I have stated is borne out upon reference to the case of *Smit v. Phillip* (23 Supreme Court Reports, page 776). In fact, I am not at all clear that sub-section (3) of section six does not allow a further counter-claim of £50 against the £50 ejectment claim, which would bring the jurisdiction of the Magistrate up to £900.

1180. That would be an extreme case?—Yes, but the law will then allow that.

1181. On principle you agree, subject to increased qualifications and increased emoluments, with the extension of the jurisdiction?—Yes, to £50, which is similar jurisdiction to what they have in the County Courts in England.

1182. *Mr. Upington.*] If the inferior Court is to be able to exercise jurisdiction to a largely increased extent, do you not consider that it will be necessary to have in the large centres of population such as Cape Town, Port Elizabeth, Kimberley,

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Graham's Town, and possibly East London, persons in the position of County Court Judges?—Yes, I think that would be desirable.

1183. Because the Magistrate who had to work in one of those large districts would be precluded from going into Court as often as he would like?—Yes.

1184. And you consider it would be desirable, if the jurisdiction of the inferior Court were raised, that in the large centres of population at any rate there should be some one in the position of County Court Judge or Recorder?—Yes.

1185. You realise that it means an increased volume of work?—Yes, and an increased knowledge of law.

1186. *Mr. Wessels.*] There are several Magistrates who have passed the LL.B.?—Yes.

1187. How many?—About two or three. I do not think any other man has passed the four examinations. If you raise the qualification there is no reason why you should not get capable men.

1188. Take the ordinary Magistrate as you find him to-day; do you think he would be competent to undertake this increased jurisdiction?—Possibly; if he makes a mistake there is always the right of appeal.

1189. Taking the majority of Magistrates, do you not think they are competent?—Yes. There are many cases in which there has been hardship, and a man would have the right of appeal to a higher Court.

1190. *Mr. Upington.*] Do you find that any large use is made of the Arbitration Act in the large Magistracies?—The only case I have had was in Simon's Town. There was a dispute between some fishermen with regard to netting their fish, and I arbitrated in that case. In fact, the arbitration was voluntary. I was not aware of that Arbitration Act.

1191. *Mr. Louw.*] Do you know the jurisdiction of a Resident Magistrate in the Transvaal?—No, but I know that the Resident Magistrate in British

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Bechuanaland had unlimited jurisdiction, the same jurisdiction as a Judge, including life and death, the latter being dealt with by a Court consisting of the Chief Magistrate and two other Magistrates. In the Native Territories too the Magistrates have very large powers and increased jurisdiction.

1192. Has not the status of our Magistrates been raised in the last 60 years ?—Yes.

1193. Their status has been raised but their jurisdiction has not been correspondingly raised. Would you increase their jurisdiction and bring it more or less on the same lines as in the Transvaal ?—I am certainly in favour of increasing it to £50.

1194. Do you think £40 would be better ?—I see no reason for making it £40.

1195. *Mr Brown :* You are not aware that it is £100 in the Transvaal and Orange River Colony ?—No.

1196. And you are not aware that it is £300 in Natal ?—No.

1197. You are surely not serious in saying that the average Magistrates at the present time in the centres named by Mr. Upington are not men who have had large experience before reaching that position ?—I never said that. My real idea of the position is that you should group districts, and have a Magistrate with extended jurisdiction to adjudicate in those grouped districts. And let him be only a judicial officer, and not one who has to attend Divisional Council meetings and take the chair at meetings of the School Board and so on, besides having to collect all the revenue from his district and perform all the other multifarious duties he has at present to perform.

1198. It is a question of relieving him of certain duties, not a question of his capacity, that you were referring to ?—Yes.

1199. Would you be in favour of the principle that in any counter-claim the Magistrate should not have power beyond his ordinary jurisdiction. Supposing, for instance, it was a claim for £250 on

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a promissory note and there was a counter-claim of £120 for damages; would you be in favour, in any amendment of the Act, of the Magistrate having no power beyond his ordinary jurisdiction, but that he should send the case to the Supreme Court?—At the present time a Magistrate can adjudicate on any claim in re-convention up to the amount of the claim in convention. Do I understand your point to be that if a man is sued on a promissory note for £250, and there is a counter-claim of £120 for damages, the Magistrate should not be allowed to adjudicate on that counter-claim, but should throw the £120 out and give judgment on the claim in convention?

1200. No, send the whole case to the Supreme Court?—No, I do not agree with that.

1201. *Acting Chairman.*] What is your opinion with regard to section seven?—I think the principle of that section is a good one. In complicated questions of account a referee would be very useful to decide upon questions of fact. The section requires a few verbal alterations, but as a section I am in favour of it.

1202. There is an amendment proposed in section seven?—Yes. The word "or" after the words "the whole cause," in line 42, also wants to be deleted.

1203. *Mr. Upington.*] This seems to me to be a serious innovation. It says any matter requiring "scientific, technical or local investigation which cannot be conveniently effected by a Court of Resident Magistrate" may be referred to an official referee?—Yes.

1204. I suppose there are such persons as Magistrates who are not over energetic, and it seems to me that this is putting a temptation in the way of Magistrates to avoid what one might call a prolonged and difficult case and to hand it over to a referee?—I think in the Supreme Court you very often have complicated statements of account————.

1205. I am speaking now of matters requiring

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scientific, technical or local investigation ?—If you increase the jurisdiction to £50 there may be an action for damages in connection with some machinery, and you want a man to go into the question from a technical point of view, and give his opinion. At Simon's Town I have had cases in which divers are concerned. In such a case, where it is very difficult to understand the whole of the intricacies of the case, I think it would be quite right to refer the question to a referee for report. All the section gives is the *power* to do that.

1206. Take local investigation ?—It is a question of distance, the size of the ground, and that kind of thing. If a surveyor is employed to go out and give the Magistrate an actual plan of the position how much better would it be for the Court.

1207. Say there is a dispute relating to land—not with regard to the title, of course, which would be outside your jurisdiction, but relating to the land itself—and the Magistrate thinks it would be a good thing instead of doing the investigation himself to send someone else to do it ?—Take a question of damages for cattle trespassing on certain property. The Magistrate goes and looks at the ground, but as he has no knowledge of the boundaries he is no wiser than if he remained sitting on the Bench, whereas if he could engage a qualified man and send him out and get his evidence as referee on the facts he had ascertained it would be very useful. I have had cases dealing with the trespassing of cattle, and I have found that it is almost impossible to decide until evidence has been obtained as to the actual boundary.

1208. Do you consider that this section will reduce the costs of the case ?—No, because you have to pay the referee for the work he has done.

1209. *Mr. Wessels.*] Your view is that it would only be in such cases where the Magistrate found it absolutely necessary in the interests of justice to obtain the services of an official referee that he would avail himself of the provisions of this

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section ?—Yes. I have only done it once or twice, but I have been very glad that it was done on those occasions.

1210. Supposing this section passes, and you employ a referee, do you think that the referee should come into Court and be examined and cross-examined by both sides ?—Yes.

1211. You do not think he should simply hand in his report and that the Magistrate alone should see that report ?—No. Say it is a question of medical evidence. The matter is referred to a medical man to go into the question, and he is asked his reasons for the decision he has arrived at. I think he should be available for examination by the parties.

1212. *Mr. Brown.*] Would you differ from the practice of the Supreme Court, where they do not examine the referee ?—I do not know the practice in the Supreme Court.

1213. Would you not prefer to follow the practice of the Supreme Court and simply have the referee's report before you ?—If that is the practice of the Supreme Court I do not agree with it.

1214. How do you arrive at the conclusion that it would cost more ? Supposing you had a question of a land dispute, in which you might have ten witnesses on each side brought from a great distance to attend the Court ; would not the referee be much cheaper in the average case ?—There is no reason why they should not have the 10 witnesses on each side as well as the referee, but that is a matter for the plaintiff and the defendant.

1215. In a matter of account, would you have a number of witnesses ?—You might, but not likely.

1216. The person you would nominate in the case of a land dispute would be an impartial party ; would you not take his decision, and if so, would that not tend to reduced costs instead of increased costs ?—Yes, and it would be much more satisfactory.

1217. *Acting Chairman.*] Do you approve of Clause

Eight?—I have no objection to section eight. It further increases the jurisdiction of Magistrates. With regard to section nine, I presume that that is meant only to apply to writs of attachment against the person, as provision is already made in section thirteen of Act 20 of 1856 for endorsing writs and attaching property in other districts. There is the case of *Harris v. Blore and Another* (7 Juta, 41). B., resident in Middleburg district, was sued in the Resident Magistrate's Court at Victoria West for a debt. He consented to judgment, and a return of *nulla bona* was made. Plaintiff wanted to issue summons for civil imprisonment, but the Clerk refused to issue summons, as B. lived outside the jurisdiction of the Victoria West Court. The Supreme Court upheld the Clerk's action. *Vos and Schultz v. Rick* (25 Supreme Court Reports, page 839.) In this case, where execution had been taken out on a Resident Magistrate's Court judgment and a return of *nulla bona* made, the Supreme Court, on a summons asking for provisional sentence on the judgment and a decree of civil imprisonment, refused to grant the application for civil imprisonment. The case of Mostert *v.* Fuche (17 Supreme Court Reports, page 256) also distinguishes. This seems to me to meet the point raised by Mr. Upington just now.

1218. *Mr. Upington.*] I should like to know, on this clause generally, if you are in favour of making the provisions of the law with regard to civil imprisoment more stringent than they are at present?—I am in favour of this clause, because my experience is that in the majority of cases the men slip out of the district purposely to evade the order of the Court granted in that district; consequently, I think it would tend to give that Court the power of enforcing and bringing to an ultimate conclusion the order granted by it.

1219. Are you in favour of making the provisions of the law with regard to civil imprisonment more stringent?—That is a very broad word. I should like to know specifically what you mean.

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1220. Do you think that the existing provisions for the civil imprisonment of debtors who do not pay small debts ought to be rendered more stringent?—With the one exception in this section I am in favour of that.

1221. Do you not think that this section may cause the greatest hardship in the hands of a hard and unscrupulous creditor?—I can see that; but as far as I can make out from what Mr. Brown said it is meant to meet cases in the Cape Peninsula, Port Elizabeth and Uitenhage, and if you limit it to 25 miles it does away with the objection.

1222. Do you know of many cases where a writ of civil imprisonment has succeeded in extorting from a debtor more than instalments?—My practice has always been, when a man cannot very well pay the full debt, to grant an order for the writ not to be issued until there is a failure in the payment of the instalments. That gives the plaintiff an opportunity of getting the money, and it gives the debtor a reasonable opportunity of paying off the debt if he wishes to.

1223. How many people on an average have you confined in your district?—Very few indeed. I have made it a practice to grant orders for instalments, and the result has been that a good deal of money has been recovered, and there has been no need for civil imprisonment.

1224. How many persons confined for civil imprisonment on an average have you?—Very few. I have about two a year.

1225. Can you give the Committee a return showing the number of debtors who have been imprisoned in your district of Simon's Town within the last 12 months?—Yes. Only one man has served his time. The result of putting them in prison has been as a rule that they pay up.

1226. *Mr. Wessels.*] It generally has a wholesome effect?—Yes.

1227. *Mr. Brown.*] You know that the Supreme Court is very averse to granting decrees of civil imprisonment?—I think the Supreme Court is

very much the same as we are in that respect. They generally give an order for the payment of so much a month. Under the Act of 1879, if a man has nothing at all you cannot grant the order; you can only grant it if you are satisfied that a man has got something. My practice has been to help the unfortunate man; and further, I do not grant any costs against the debtor if I can possibly help it.

1228. *Mr. Wessels.*] In fact, cases have come before you in which a man has proved that he has got nothing, and you have not made an order?—Yes.

[At this stage the Attorney-General entered the room and Mr. C. J. Krige vacated the Chair.]

1229. *Mr. Brown.*] Have you ever heard of the system of arrest of wages? In Scotland, when they abolished civil imprisonment, they adopted the system of granting orders to arrest wages to meet the debt?—That is practically the same as giving an order for instalments. The only difference is that instead of getting the money from the man direct you get it from his employer.

1230. How would it strike you as a mode of relief instead of civil imprisonment?—Very often these unfortunate debtors do not want their master to know that there is an order against them, because if the master knows it they will probably be discharged.

1231. Do you not think it would be better to adopt that plan and abolish civil imprisonment altogether? — Supposing a man has not got a master. He may be earning his 30s. a week by his labour and yet not be under a master. A man may grow vegetables and sell them, for instance.

1232. Would you not prefer that and abolish civil imprisonment?—No.

1233. *Mr. Upington.*] Would it not suffice to leave the existing power to commit for wilful contempt? Apart from the order for civil imprisonment altogether you can commit for wilful contempt of an order of Court?—It is difficult to prove

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1234. That would meet the case of your man who can pay and won't pay, but it would make the creditor prove first of all that the man can pay and won't pay?—Why should you put that onus on the creditor?

1235. *Chairman.*] What is your opinion with regard to section ten?—I am doubtful whether this section is necessary, as it was decided in the case of *Silberbauer v. D.* (2 "Cape Times" Reports, page 66) that *money* can be attached, and in the case of *Blake v. Roos* (3 "Cape Times" Reports, page 110) the share of an inheritance due to a debtor was allowed to be attached by order of a Judge without a judgment of the Supreme Court.

1236. You say you doubt its necessity?—Yes.

1237. The object of this section is to enable the creditor to come down on cash and scrip, and everything of that sort at once; that is so?—Yes.

1238. Do you see any objection to cash and share certificates, and so on, being placed in the category of movable property and movables?—No, I see no special objection to it, but there is at the present time procedure in the Supreme Court which does not cost very much, and I do not quite see that it is necessary to amend the law in that respect.

1239. *Mr. Wessels.*] Have cases come under your notice where judgment has been given and a man has had cash or scrip in his possession?—Yes. There are very often cases where a man has money in the Government Savings Bank. I have had that frequently with Indians. Of course, you cannot attach that money without an order of the Supreme Court, but in the meantime you can get an interdict.

1240. *Chairman.*] What is your next point?—With regard to section eleven, I think that that section is an improvement upon the present law, which is most unsatisfactory. Under the present law, when a Messenger goes and attaches property, if anybody other than the debtor claims that property, all the Messenger has to do is to report to the Magistrate, and the Magistrate has

to institute an action. There is no provision, however, who is to pay the costs and put stamps on the documents, and the whole procedure is very unsatisfactory. You very often have Magistrates not instituting these actions, and the result is that an action is brought against the Messenger for not having attached the property and executed the order.

1241. The onus of bringing the action is cast on the civil authority ?—Yes, which is not right.

1242. *Mr. Wessels.*] Do you think this section makes it much clearer ?—Much ; this is quite satisfactory.

1243. Is it not a fact that Messengers have got into trouble for selling property which they have attached, but which did not belong to the debtor ? —Yes, and action has been brought against them. It puts the Messenger in a very invidious position indeed.

1244. *Mr. Upington.*] With this extended jurisdiction of the Magistrate's Court, do you not think the margin of time provided in this section is small ?—No.

1245. Supposing you have a writ issued in the Court of the Resident Magistrate of Mafeking coming down here and being endorsed in the Cape District. The owner of the property attached may be goodness knows where ; he may be in East London, for instance. You fix a time in this Act, whereas at present there is no time fixed. Do you not think the times proposed in this section are too short ?—That might be so in a case such as you have quoted.

1246. The times must be such, I suppose, you will admit, as will cover the most extreme case within reason ?—I do not think so at all. I do not see any hardship. On the whole, perhaps, it would be better to lengthen the time.

1247. Do you not think the Messenger should take the name of the person to whom it is said the property belongs, and that a notice should also be sent to that person that it has been attached ?

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Supposing a person had lent a cart and pair of horses to the debtor, who at the time of the seizure was 50 miles away, should not the Messenger take the name of the person whose property the debtor says it is, and should not that person also be notified of the matter?—Yes, that would be reasonable.

1248. *Chairman.*] What is the next point?—I am doubtful if section twelve is necessary in face of the decision in *Deercourt & Fawas v. Urie* (14 Eastern Districts Court, 86) that the property of a debtor in the hands of a third party can be attached to satisfy a judgment of a Magistrate's Court by order of a Judge, a *rule nisi* granted, without obtaining a judgment of the Higher Courts for the debt before applying for the attachment. *Magor & Fogarty v. Mulvihal* (24 Supreme Court Reports, page 599); order of attachment granted in Chambers by a Judge. *Forsati v. Kleynhaus* (5 Shiel, 140); order of attachment granted by a Judge.

1249. *Mr. Upinglon.*] Is that attachment in satisfaction of a judgment of the Magistrate's Court or attachment pending proceedings for provisional sentence in the Supreme Court?—In satisfaction of the Magistrate's Court judgment.

1250. Do you think that doing away with the necessity of application to a superior Court is desirable?—Possibly the property might be in another district, and it is perhaps better, if it should be in another district, that the Supreme Court should have the work.

1251. What is your opinion upon this section, not from the point of view of the creditor only, but from the point of view of justice generally?—As far as the debtor is concerned, if a man lives 500 miles away, and you attach his property, he would then have to appear before the Magistrate's Court which issued the warrant of attachment. There is no procedure in the Magistrate's Court by which you can appear by affidavits as you can in the Supreme Court. That man would have

to go personally to the Magistrate's Court with all his witnesses, where he could do it before the Supreme Court by affidavit.

1252. Do you approve of this section ?—Taking it all round I do approve of it.

1253. *Mr. Wessels.*] Do you think it necessary ?—I have not a very strong opinion on that point.

1254. There are always cases where people, in order to avoid payment of their debts, place the whole of their property in the hands of their friends. Do you not think that in those cases you should have some simple machinery to deal with the matter ?—When the parties are living in the same district, undoubtedly, but when they are not in the same district I see there are arguments both ways, and I do not express any opinion.

1255. *Chairman.*] We may take it that you would rather express no opinion on the point ?—Yes.

1256. *Mr. Brown.*] You said that, provided the parties were in the same district, you thought the Magistrate should have the power ?—Yes.

1257. Would you apply the same rule as I suggested just now with regard to civil imprisonment, namely, a distance of 25 miles, so as to meet the case of places like the Cape Peninsula ?—I would approve of the section if it only applied to the Cape Peninsula.

1258. *Chairman.*] Do you think the provisions of this section should be confined to parties living within the same district ?—Yes.

1259. Subject to that condition you are in favour of the section ?—Yes. The only objection I have is to its application in cases where any of the parties live in another district.

1260. In cases where the parties do not reside in the same district you think there should be some other procedure ?—Yes.

1261. To meet cases such as the Cape Peninsula, would you have a distance of 25 miles from the Magistrate's boundary ?—No, I confine myself to property in the district.

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1262. What is the next point?—I have no special objection to section thirteen.

1263. Have you any special approbation of it?—I think if section twelve stands section thirteen is necessary.

1264. Would you make the same conditions apply as you suggest with regard to section twelve?—Yes.

1265. You approve of the provisions of section thirteen, providing the operation of the section is confined to cases where the parties are residing in the same district?—Yes.

1266. *Mr. Wessels.*] It lays down the duties of the Messenger very clearly, so that if he acts according to this section he cannot get into trouble?—Yes, he cannot go wrong.

1267. *Mr. Brown.*] Would you be in favour of limiting the value of a person's furniture that can be sold off?—It is limited now to £5 personal effects.

1268. That does not mean furniture; personal effects means a person's bodily clothing and things of that kind?—Yes, and tools.

1269. Would you place a limit of value upon what could be sold of a person's effects?—I do not think there is any special reason to alter the present law, which limits it to £5 tools and personal effects. Do you mean that a man's bedstead should be left?

1270. A bedstead can be removed, provided the bed is left?—I do not know if that can be done. I have always been under the impression that it meant £5 in value of anything.

1271. Would you leave it at £5?—Yes.

1272. Would you be in favour of a system by which, after the stuff is seized, the Magistrate should make an order that so long as the instalments were paid regularly it should not be sold?—No, I would sell it straight away, because otherwise you would have such an accumulation of stuff at times. If you attach a property for £10, and the man has to pay £1 a month, who is to

keep charge of the house in which the property which has been seized has been stored? Of course, provided a man gave security that he would not do away with the stuff, I would not object to its remaining.

1273. *Chairman.*] What is your next point?—Section fourteen. I have no objection to that section. With regard to section fifteen, I am of opinion that the present law goes far enough in the matter of arrest for civil imprisonment, and I am not prepared to recommend any extension of the present powers. That is to say, if a man is sentenced to civil imprisonment for a debt of £20 and he pays £10 he is released, and the law lays down that he cannot be re-arrested. I am not prepared to recommend section fifteen.

1274. And the next section?—I have no objection to the first part of section sixteen, but I would suggest that the last portion, "Section twenty-two of the said Act is hereby repealed," be deleted. I have no objection to section seventeen.

1275. *Mr. Brown.*] Do you approve of the debtor having to pay for his maintenance while under arrest?—If you decree a man to civil imprisonment for a fortnight, under the present law the creditor has to pay 1s. a day for his maintenance and the debtor has not to pay it back, which I think is unreasonable. Under this section you want to make the debtor pay.

1276. *Chairman.*] What is the next point?—I have no objection to section eighteen. With regard to section nineteen, I have no objection; in fact, I am strongly in favour of it. The reason I am in favour of section nineteen is that very often a man wants to get a writ out quickly, and the procedure will be expedited if the Justice of the Peace can take the affidavit and authenticate the signature, leaving it to the Magistrate to decide whether the security is sufficient before granting the order. That is all the section means, I take it.

1277. And with regard to section twenty?—I have no objection to that section.

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1278. Section twenty-one ?—No objection.

1279. Section twenty-two ?—No objection.

1280. *Mr. H. S. van Zyl.*] Is that not provided for by the present law ?—No. I think, seeing that you have so many attorneys being admitted every day, it is time to close this door. I admit that agents have done very good work in their time, and formerly, when you could not get attorneys, their admission was desirable ; but now that you have so many practising I do not think there is any reason for admitting any more. I think inducement should be given to properly qualified men to go and settle in those districts where there are not two attorneys.

1281. What have you at Simon's Town ?—One attorney and numerous agents. I do not admit any more of the latter, and I think it is advisable not to have any more agents at all. I think they have done their work in South Africa. At one time there was a necessity for them, but now there is no question of their necessity.

1282. I am thinking of places where there is only one attorney ?—There are lots of young attorneys available ; give them the opportunity and they will qualify.

1283. What use is it to people in a place where there is only one attorney to know that there are plenty of attorneys elsewhere ; the point is they are not at that place ?—If a young attorney knows there is an attorney and an agent in a place he will not go there, but if he knows there is only one attorney he will go there.

1284. *Mr. Brown.*] The fact of admitting an agent in a place like that blocks the young attorney from going there to begin to practice ?—Yes.

1285. *Chairman.*] What is your opinion with regard to section twenty-three ?—I have no objection to section twenty-three.

1286. Section twenty-four ?—No objection.

1287. Section twenty-five ?—I do not see any reason why the Supreme Court should go into cases of misconduct of agents. I think the existing provision is quite satisfactory.

1288. *Mr. Brown.*] Have you in your experience had many cases of dealing with agents?—No, I have had very few agents to deal with.

1289. There might be personal friction between the agent and the Magistrate. I have not met with that myself, but there might be such a case?—Even if there were personal friction, the Magistrate who makes the order has to submit it to the Registrar of the Supreme Court.

1290. But the Magistrate himself takes the evidence?—Yes, and submits it to the Registrar of the Supreme Court, and if the agent thinks the Magistrate is biassed he can appeal to the Supreme Court.

1291. *Chairman.*] Section twenty-six?—No objection.

1292. Section twenty-seven?—No objection.

1293. Section twenty-eight?—No objection.

1294. Section twenty-nine?—I object strongly to this section. Section 4 of Act 21 of 1876 has worked very well, and the numerous cases under that section clearly show the present law to be satisfactory. The present period for notice of appeal is four days, and I do not see any necessity for altering that. That applies to appeals in criminal cases, and in such cases I think four days is quite sufficient.

1295. *Mr. Brown.*] What do you think of the three months' period?—I am not in favour of that at all. I think four days to note the appeal and 41 days to prosecute it has acted very well indeed throughout the country in the past.

1296. You would leave a right of appeal to the second circuit, as can be done at present?—I do not see any necessity for this alteration.

1297. At any rate you would make it to the second circuit, or to the Supreme Court, or to any other superior Court within three months?—Under the law at present the defendant is the only one who can appeal; I think the prosecution should have the right of appealing too. I am not aware that the defendant can hold an appeal over to the second Circuit Court.

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1298. *Chairman.*] Section thirty?—I do not agree with this section at all. Under the present law a Magistrate has no discretion as to whether to send preparatory examinations to the Attorney-General. See section twelve of Act 8 of 1852. This section thirty as drafted is quite impossible. A man may be committed for trial on a serious offence, claim to be tried by a Magistrate, and the Attorney-General must remit the case to the Magistrate. The case may be one where the punishment should be severe, and the Magistrate's jurisdiction is limited, under Act 43 of 1885, to twelve months. This would be absurd. The present procedure of leaving the question of trial before a jury or Magistrate to the Attorney-General is sound, and I do not think can be improved upon. If a prisoner wishes specially to be tried by a jury or Magistrate there is nothing to prevent him making that request, and the Attorney-General will no doubt give it every consideration. I suggest that section thirty be deleted.

1299. *Mr. Brown.*] Would you be in favour of the question being put to the accused, "Do you wish to be tried by a jury?"—Yes.

1300. Because he will not think of asking the Magistrate himself?—Yes, I think that would be very good.

1301. Are you in favour of the Magistrate who starts, conducts and hears the case throughout, finally adjudicating the case?—Yes.

1302. *Mr. Wessels.*] Are you in favour of or against section thirty?—Against it. I do not think an accused person should claim that as a right, but if he wants his case to go to a jury the Magistrate can make a note of it and send it to the Attorney-General.

1303. You think the decision should rest absolutely with the Attorney-General?—Yes.

1304. I suppose in the generality of cases remitted to the Magistrate for adjudication there is either a plea of guilty or otherwise the circum-

stances disclosed in the record are of so simple a nature that there is no difficulty in deciding the case ?—Yes.

1305. *Mr. Brown.*] Are you in favour of having preliminary examinations in cases of rape and such like heard *in camera* ?—Yes. At present the only case the Magistrate can take *in camera* are cases under the Contagious Diseases Act. Other cases, of whatever nature they are, have to be tried in open court.

1306. What do you think of the idea of hearing such cases *in camera* ?—I should like very much to be able to do it, because at times some horrible cases come into court.

1307. *Chairman.*] What is the next point ?—Section thirty-one. I have no objection to this section, provided the words "or Justice of the Peace" mentioned twice be deleted.

1308. Section thirty-two ?—If the word "shall" in line 66 be deleted and the word "may" be inserted after "Magistrate" in line 67, I have no objection to this clause.

1309. And section thirty-three ?—No objection.

1310. Have you any observations with regard to the Schedule ?—I have no objection to sections one to six of the Schedule.

1311. *Mr. H. S. van Zyl.*] With regard to the filing of pleadings, do you think it is desirable there should be pleadings in the Magistrate's Court ?—Yes. The present procedure is most unsatisfactory. The procedure we had in Bechuanaland and Griqualand West of filing pleadings before 2 o'clock the previous day was very much more satisfactory.

1312. Is it not undesirable to first bring the parties into Court before you make an order that pleadings should be filed ?—Yes.

1313. There is unnecessary expense incurred if you first bring the people their four or five hours' distance to the court, and then issue an order for pleadings to be filed, and at the same time putting the hearing of the case off for

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some days?—Yes. I think the better procedure is to file the plea the day before. As the law stands now, a Magistrate can give judgment without taking evidence in all cases of debt and liquid claims. It often happens that the defendant comes prepared with all his witnesses, but the plaintiff has not his witnesses, and the plaintiff is let in for the costs. The defendant is quite right to defend the case, but the plaintiff is not ready. If the plea had been filed the day before you would not have that.

1314. If the plaintiff lived a long distance off, a day's journey say, and the pleadings were filed the day before, he would have no knowledge of that?—That is simply a question of extending the time. I am in favour of the pleadings being filed a certain time before the case comes on. If 48 hours for the service of summons is not sufficient, extend that time, and then a man will know if he has to bring witnesses for his case or not.

1315. You were a Magistrate in Bechuanaland and in Griqualand East?—In Bechuanaland, but not in Griqualand East.

1316. And you had a different system there?—Yes; the procedure in the Magistrate's Court there was that the pleas had to be filed by 2 o'clock the previous afternoon before the case came on.

1317. And you found that worked well?—Yes.

1318. It worked better than our system?—Yes, our present procedure is most unsatisfactory.

1319. *Chairman.*] Have you anything else to say on the Schedule?—With regard to clause seven of the Schedule, I think the present procedure is quite satisfactory. At present you file your appeal before the next Court day. When you file your appeal you have to deposit £1 17s. 6d., and you have fourteen days to decide whether you will prosecute that appeal or not. If you withdraw the appeal within the fourteen days you get your £1 17s. 6d. returned.

1320. *Mr. Brown.*] Would you not be in favour of saying a certain number of days? Is not "next

Court day" a rather difficult problem in a case where the Court sits daily?—All Courts sit daily, but Mondays and Thursdays or Tuesdays and Fridays are fixed days for civil business.

1321. Do you see any objection to altering it to three days instead of the next Court day?—No, but I prefer the present arrangement.

1322. In Port Elizabeth Tuesdays and Thursdays are Civil Court days. Do you think between Tuesday and Thursday a reasonable time?—I do not know about Port Elizabeth.

1323. *Chairman.*] Have you any objections to the Schedule as a whole?—No; I have no special objections.

1324. *Mr. Louw.*] Do you think, taking the Bill as a whole, it is going to cheapen litigation?—No, because you have provision for costs all over the place in the Bill.

1325. Do you not think that one of the things at which the Bill aims is to assist the creditor more than he is assisted under present circumstances?—Yes.

1326. To assist the creditor as against the debtor?—Yes; and I think that is reasonable.

1327. Do you not think that in this Colony we have a very indiscriminate manner of giving credit, which ought to be discouraged rather than be protected?—The only extension of protection you have given is with regard to civil imprisonment when the debtor goes to another district. The tendency in this country is undoubtedly to give credit; one sees that especially in the Native Territories.

1328. *Mr. Oosthuisen.*] Do you think this Act will bring more litigation into the Magistrate's Court?—Undoubtedly, very much more.

1329. Do you think it will assist in this way, that cases which at the present time are not brought into Court at all, on account of the difficulty and the costs that would have to be incurred in the Supreme Court, will be brought into the Magistrate's Court?—Yes.

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1330. Therefore in certain instances it would be for the good of the public ?—Yes.

1331. *Mr. H. S. van Zyl.*] Then you were not quite correct when you said it would not cheapen litigation ?—It would increase the expense of going to the Magistrate's Court, but it would be still more expensive to go to the Supreme Court.

1332. By increasing the jurisdiction of the Magistrate, and enabling certain cases which were formerly heard before the Supreme Court to be heard in the Magistrate's Court, litigation in those cases would be cheaper ?—Yes, it would be cheaper in those cases. I was only referring to the Magistrate's Court when I said that the cost of litigation would not be cheapened.

Wednesday, 24th November, 1909.

PRESENT :

The ATTORNEY-GENERAL (Chairman).

Mr. W. P. Schreiner.	Mr. Cronwright-Schreiner.
Mr. Upington.	Mr. Oosthuisen.
Mr. H. S. van Zyl.	Mr. Louw.
Mr. Wessels.	Mr. C. J. Krige.
Mr. D. M. Brown.	

[In the absence of the Chairman, Mr. Cronwright-Schreiner took the chair].

Mr. Malcolm William Searle, K.C., examined.

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1333. *Acting Chairman.*] You are a barrister-at-law and a K.C. ?—Yes.

1334. Have you read the Bill which is before this Committee ?—Yes.

1335. The Committee would like your opinion upon the Bill. Perhaps the best way would be for you to take the Clauses *seriatim* and give your remarks upon them ; will you do that ?—Yes. I may say I have read the Bill, though I have not been able to give it quite as close attention as I would have liked to do, and as I would have done had I had a little more time. I did not know

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until a day or two ago that I was to be asked to give evidence. I would also point out that I have not had an opportunity of consulting other members of the Bar, so that anything I may say is my own personal view in the matter, and would not necessarily be agreed to by other members of the Bar in Cape Town.

1336. Am I right in assuming that you have not much practical knowledge of the working of the Magistrate's Court?—I have not much personal practical knowledge of the working of the Magistrate's Court so far as having been into the Court is concerned. From time to time I have been there, though not for many years past. Of course, one has seen a good deal of the effect of the working of the Magistrate's Court in appeals to the Supreme Court, and one is also very often consulted upon matters of Magistrate's Court procedure, so that most of these sections and amendments, if not all, have come under one's observation from time to time during the course of one's practice. As I say, I have not had much practical experience of conducting cases in the Magistrate's Court, though I had a certain amount many years ago. We have unfortunately not had a meeting of members of the Bar to consider this Bill, consequently it is impossible for me to give the Committee any general idea of what the Bar as a body thinks of it.

1337. What are the main points in which you think the Act might with advantage be amended, if such points exist?—I think that section four is a good amendment. Considerable difficulty has been experienced with regard to the interpretation of the law as it exists, and certain hardships have arisen in respect of the jurisdiction of the Magistrate's Court with regard to people residing in one district and having a business in another district. I think section four is a good amendment. With regard to section five, I understand that the amendment has been mainly brought about on account of difficulties that have been caused in

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executing decrees of civil imprisonment when people have left the district. Of course, the section is wider in its terms than that, but I know there have been difficulties of that character, and on the whole I think that the amendment is good, provided that it is made clear that the Court is always to keep in touch with the defendant by giving notice to him or to his attorney of the proceedings at the different stages. I can quite imagine, if nothing of that sort were done, that there might be a case, which stood over say *sine die*, left over for a long time, as some cases are in Magistrates' Courts, and then mooted again long after the defendant had left the district altogether. Such a case might be taken up again by the plaintiff and brought before the Magistrate, and the Magistrate might then give judgment against the man long after he had left the district and when he had not an opportunity of putting his defence before the Court. I think there ought to be something in section five making it clear that, when the Magistrate takes up a case after the defendant has removed from his jurisdiction, he should be satisfied that the defendant, or someone authorised to act on his behalf, has been notified of what is going on. Subject to that I think the Clause a good one. Clause Six I think a very good and desirable Clause. I am certainly in favour of increasing the Magistrate's jurisdiction, and I think that £50 is a very fair limit to increase it to in illiquid claims, which is the main provision in section six. Sub-section (1) of this Clause merely extends the class of documents in respect of which the Magistrate has jurisdiction up to £250. I approve of sub-section (1), as I think it is an advantage to cover all those documents. And I think the Magistrate's Court jurisdiction might very well be increased to £50. I think it a very great hardship that people should have to come from a far distance to the Supreme Court, or to the Eastern Districts Court, or to the High Court, in cases of small claims under £50, and have to incur

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the very great expense in connection with their witnesses. I also agree with sub-section (3). I approve of the whole of Clause Six. I also think section seven, as amended, is a good section. The principle of it is good. With regard to section eight, I think a Clause of that character ought to follow on section six. Section nine I also think a good Clause. There has been very great inconvenience caused, one knows, by the absence of a Clause of that character in the present Act. With regard to Clause Ten, I think it is in the right direction, if it is necessary, but I should doubt myself if such a Clause is necessary. I do not disapprove of this Clause in any way.

1338. The witnesses we have had before the Committee do not disapprove so much of cash as of the equivalent certificates of shares. Would you be prepared to let shares in companies and corporations and that kind of thing be attached? —Yes, I think so.

1339. And with regard to section eleven?—I am not sufficiently acquainted with the facts to say whether difficulties really have arisen from the present procedure. So far as I am aware, there have been no serious difficulties; still I think it is a good Clause on the whole. I think, however, that as it is put it is rather vague. I would prefer the words to be inserted: "The following shall be added to Clause fifty-three of the Principal Act." If you say the clause shall be amended and amplified it is by no means clear that it is an addition. In fact, I thought at first that it was to take the place of a previous part of the section fifty-three, but I now understand it is not to take the place of anything at all but is an addition, so that I think it should be made clear by saying, "The following shall be added to section fifty-three of the Principal Act." With regard to section twelve, this seems to me to be a good Clause as it is amended, being able to attach property in the hands of a third party.

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1340. Does not striking out the words "or part owner" alter the gist of the Clause? Cannot the Court now attach property in the hands of a third party and then have an interpleader?—Yes; but I thought this was in the nature of a sort of garnishee order. I thought it might refer to a debt owed by another. I thought that was the main object of this Clause, and rather read it in that way as intending to attach a debt. At the present time the Supreme Court gives these orders, but I do not think the Magistrate's Court has the power to give such an order, and so far as that is concerned I thought it a good Clause. Section thirteen really follows on section twelve. Section fourteen seems to me to refer to contempt of Court, and I do not think it has anything special to do with sections twelve and thirteen. It refers to all attachments. I should have thought myself that exceptional cases of that character might have been dealt with by the Supreme Court. In fact, I know such cases have been dealt with by the Supreme Court. There is certainly one reported case that I know of where that was done, and I think there are more.

1341. It specially refers to the two preceding sections?—Yes. I see no objection to it. Those are really mainly the sections which I approve of, and I am afraid that, broadly speaking, I disapprove of the second part of the Bill. I do not disapprove of the whole of it, but I disapprove of a great deal of the second part of the Bill, and I think it is a pity to tack that on. With regard to section fifteen, I am not in favour of that section at all. I think it is a great pity to increase the facilities of civil imprisonment or the costs to be allowed to a person who is making use of that remedy. Certainly in England the experience of Judges and Magistrates is rather going the other way, and I do not think that further facilities should be given to those who seek that particular remedy. I think we have quite sufficient facilities at present, and I would not be in

favour of increasing them. This applies really to sections fifteen, sixteen and seventeen. I admit there are exceptional cases, but I think, broadly speaking, it is more harmful to deal with it in this way, and I would rather let the law stand as it is. The same remarks apply in my view with regard to sections eighteen, nineteen and twenty. I see what is to be said for these sections, and possibly it may be logical to pursue to the very last the tenant whose goods are being distrained and so on, but I am not in favour of giving the very uttermost farthing to the man who wants to oust his tenant. I would rather not see these sections eighteen, nineteen and twenty put in, and I very strongly object to section twenty-one. As printed section twenty-one is most objectionable. I see now it has been amended. I have not seen these amendments before. I think it very objectionable to say that in every circumstance a man must be sold out. The amendment, I see, modifies the section very much. It allows the Magistrate to tax and allow the costs before the goods are released. I am not sufficiently acquainted with the facts to say whether there is really any great hardship as the law at present exists, but even if there is some possible hardship as it at present exists, I would rather see the law remain as it is, because I do not think it advisable that costs should be piled up in cases of this character at all. At the same time there might be cases where I suppose the 15s. would be quite inadequate. Upon the whole, after seeing the amendment proposed, I think I should prefer to leave the law as it is now. I cannot say that I am in favour of section twenty-two either at the present time. It seems to do away absolutely with any admitted enrolled agents, and I cannot help thinking that there may be places opened up where it might be advisable still to have agents. Of course, as you are aware, agents' rights are limited. Those who are admitted now are limited to the place where they are admitted. I cannot

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help thinking it might be a hardship on the public if you do away with them entirely.

[During the last answer the Attorney-General entered the room and took the Chair.]

1342. *Chairman.*] Do you consider that the provisions of the existing law, whereby no agent shall be enrolled in any place where there are two attorneys practising, is a sufficient protection ?—Yes. Take a place just starting, where there is only one attorney practising. There may be small townships to which two attorneys would not rush at once, and if section twenty-two were made law there would be no chance for any agent to be admitted.

1343. In such circumstances, if a second attorney were not there, it might be a very desirable thing that a law agent be allowed to practise, so that there should be two practitioners ?—So it occurred to me.

1344. The promoters represent that this provision in section twenty-two is really hanging together with the subsequent sections providing for the joint practice of attorneys with law agents, and their point is that they are making certain provisions here in favour of law agents—by allowing for partnerships and so on—and that being so they consider it will be a sort of sop to the attorneys if they provide that there shall be no more law agents ?—I was looking at it from the public point of view. It seems to me that in small communities just starting there will be many cases where only one attorney will be practising, and then it will be impossible for one of the parties to a suit to get any one to take his case.

1345. What is your opinion with regard to section twenty-three ?—I do not think I have any objection to section twenty-three. It seems to me, however, if I may say so, a little out of place in this Bill—referring to advocates and attorneys and so on. Still, I have read through the provisions of sections twenty-three and twenty-four, and I do not think I can offer any criticism upon them. I

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think they are satisfactory, if they are to come in the Bill at all.

1346. As to the punishment of the offence of "falsely acting as a duly qualified practitioner," would not any person who did that be amenable to prosecution as the law stands now?—I should think he would.

1347. If a man falsely represented himself as a duly qualified practitioner, and did practice and take fees as such, would he not be obtaining money under false pretences?—I take it he would. I take it the common law would apply to that.

1348. Is there really any necessity for this section?—No, I am inclined to think there is not. I have not felt at all enthusiastic about these clauses going in, but I do not think I can suggest any amendments of them particularly.

1349. You do not desire to say anything particular about the provisions in section twenty-four for partnerships between qualified men and laymen? I think the practice is condemned at the present time, is it not; I understood it was at present condemned. At any rate, I take it that with regard to attorneys that is the case?—This really only enlarges it with regard to agents, as I understand it.

1350. Of course, the real point about this clause is that inferentially it legalises partnerships between attorneys and agents?—Yes.

1351. On that point what do you say?—One knows that it is so very frequently the case throughout the country that I think it would probably be a very difficult thing to stop. I think if one had to do it all over again one would not allow such partnerships to be entered into, but I see a difficulty now in interfering with what I understand is such a very common practice throughout the country. That being so, I think it would be better to leave it as it stands. I do not fancy that people generally are prepared to make the thing punitive against any one conducting operations in this manner.

1352. What do you say with regard to section

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twenty-five?—I prefer to leave the law as it is. I am against section twenty-five as printed in the Bill. The amendment proposed makes the inquiry more elaborate than under the present law, and I suppose what is aimed at is that at the present time these inquiries are not sufficiently searching and not conducted with sufficient regularity. I think the amendment is a great improvement on the section as it stood.

1353. With regard to the amended section twenty-five, do you not think that the control now exercised by Magistrates over agents practising in their Courts is sufficient? They can deal with those agents; they have control over them?—Yes.

1354. Is it a necessary thing to take from the Magistrate the control over the practitioners practising in his Court, and who are confined to that Court, and execute this elaborate arrangement for bringing the matter before the Supreme Court?—I do not think it necessary. I cannot see there is any great evil arising out of the present condition of things.

1355. If an agent misbehaves himself the Magistrate can strike him off the roll?—Yes.

1356. What are your next remarks?—With regard to section twenty-six, the amendment is a great improvement on the section as printed in the Bill. The only remark I had to make was that it would be very difficult to work it out as the section was drafted. As amended I think it is a good section. I have no objection to section twenty-seven. With regard to section twenty-eight, the only amendment I was going to suggest, though I am not sure it is absolutely necessary, is that it might be made to read, "advocates and attorneys of the Supreme Court, Eastern Districts Court, and High Court." I think there may be advocates of the Eastern Districts Court and of the High Court who are not advocates of the Supreme Court. You do not want to exclude such persons. With regard to section twenty-nine, the Act referred to, No. 35 of 1893, I think applies to stock theft offences, and

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no period for appeal is provided there at all. Act No. 21 of 1876 says four days. While upon that, it might be advisable, if I might be allowed to suggest it, to consider the point whether the words "should such appeal not be prosecuted" might not be elaborated in such a way as to enable a man to have his clear 41 days for setting down his case. I have known of cases of hardship where the man was convicted and put his papers in the hands of some attorney or agent, as the case may be, but nothing was done until towards the end of the 41 days, say a week before the 41 days elapsed. He then came to the Registrar to set down his case, and was told there was no Court day on which he could set it down. He has even applied to the Court, and the Court has held that the case cannot be heard at all if there does not happen to be a Court day on which he can set it down within the 41 days.

1357. *Mr. Upington.*] Does not the Court grant an extension in such circumstances?—I know a case where they would not do so.

1358. When application was made within the 41 days?—Yes.

1359. And there was no clear Court day?—Yes.

1360. *Chairman.*] That is an extraordinary procedure?—The Court held that the case must be prosecuted; that is, must be put down on a date for hearing within the 41 days.

1361. It might be that even if the man took every precaution to put the case down within 41 days the state of the roll might be such that he could not get a day?—Perhaps I did not make myself clear. It was not a case of the state of the roll at all, but there was no sitting of the Court. There happened to be no Court day upon which the case could be set down for trial. It was out of term. It seems to me to be more reasonable to allow a man his 41 days within which he can set down his case. Let him set it down within the 41 days, provided he sets it down in a reasonable time for the Court to take it after the 41 days I

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think people are misled. A man thinks he has 41 days, and he comes, say after 34 days—of course, he should not be so late, still he does come as late as that. Then he finds he cannot set his case down within the 41 days because there is no Court day upon which he can set it down. In such circumstances the Court has held that the case cannot proceed at all. With regard to section thirty, I think it is very doubtful whether any change is necessary. With regard to the proviso to this section proposed in the amendments, even with that I am not prepared to say it is a change that it is necessary or advisable to make. I know there is a strong feeling in certain quarters about this, where a man is supposed to have a better chance before a jury than before a Magistrate, and when a case is remitted the man sometimes thinks that he is necessarily going to be convicted. But after all that is not the law in any way, and, as far as I am aware, I think the practice shows that Magistrates do not regard it that when a case is remitted to them it is in the slightest way a direction to them one way or the other. It is not intended to be, and I do not think it is regarded as such. And the result of the proposed change, I think, may be that you may get a large number of cases of a comparatively insufficiently important character or nature tried before a jury. At the same time I am quite aware that my views are not held by a great many people. With regard to section thirty-one, it seems to me to be a good principle, but it appears to me to be rather too vague, and I think it might be taken advantage of in certain cases. I think what is proposed here should not be done in every case, and I am of opinion that the words "unable to attend Court in person" ought to be elaborated. It ought to be made to apply only in special cases, but in special cases I think it is a very good principle. I think the Magistrate should be satisfied that there is good reason why the man does not attend the Court, otherwise it is

very simple for a person to say he is unable to attend. If the word "or" in line 53 were taken out and the word "and" substituted it would be an improvement, and I think the section might still further be strengthened in the way I have indicated. With regard to section thirty-two, the same words are used, "who is unable to attend Court in person." Otherwise I think it is a good section. I do not know about the word "impolitic"; I suggest "unreasonable." Mr. M. W. Searle, K.C. — Nov. 24, 1909

1362. I was going to suggest that the section would be improved by the omission of all the words from "and upon," in line 67, down to "impolitic," in line 69?—I do not think any hardship would be done by leaving out those words. In any case I would omit "impolitic" and put in "unreasonable." With regard to section thirty-three, I think that is a good section. There again, instead of "impolitic" I think it would be better to have "unreasonable." In fact, the part might be struck out from "and if there be no reasons" down to "such place," in lines 22, 23 and 24. And "may" should be inserted instead of "shall" in line 9.

1363. That also applies to section thirty-two in line 66?—Yes; and leave out that part about contagious illness.

1364. There is a proposed new section thirty-four; what is your opinion of that section?—If there is any danger that the Schedule would not be regarded as effective, I think it might be as well to put that in.

1365. Then section thirty-four as printed would become section thirty-five?—Yes.

1366. What about the Schedule?—With regard to the Schedule, personally my view is that it is rather too elaborate. It seems to me it might create considerable delay, where promptitude is desirable, to adjourn every case whenever a defendant did not admit the claim in order that a plea might be put in. I know it is said it puts the plaintiff to hardship to have a plea of the general

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issue. Still, the Supreme Court has decided that you cannot raise everything under the general issue, and there are decisions to that effect. And it seems to me to be the lesser of two evils not to have too elaborate proceedings in the Magistrate's Court. I think it will create a considerable amount of delay if the defendant is ordered to hand in a statement in writing. I suppose rule two applies to whether the defendant appears in person or not.

1367. Do you think it better to leave the procedure with regard to pleadings and issues in the Magistrate's Court as it is now, or do you suggest some sort of approach to having a clearer definition; because sometimes these cases are spun out to weeks, especially in the Transkei, owing to there being no issues defined?—Yes, that is so. I would have liked to have thought over that point. I think it might be as well if a defendant were allowed within a certain time to put in his plea if he wished, but I do not think it would be advisable to compel him to do so.

1368. Will you consider this and let us know if you desire to give further evidence on this point?—Yes. I know it is an evil at present, having seen so much of it from appeals that come before the Supreme Court, but I think what is proposed here is the greater evil of the two.

1369. What do you say with regard to the rest of the Schedule?—Section five will follow if you have sections two, three and four, and I think this section is all right. With regard to section seven, I think the seven days is a good amendment, but I do not like the rest of the section.

1370. There is an amendment to rule seven?—There is to be no deposit at all; is that the idea?

1371. Yes, that is what is intended, as I understand?—As it stands in the printed copy, the effect would be that the man could not get his deposit back. I thought that was the intention, and I have a note that deposits could not then be recovered.

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1372. Now, apparently, they are going to provide that there shall be no deposit at all, so that the necessity of providing for getting it back or otherwise disappears. If the effect of this section with the amendment is to do away with the necessity for a deposit altogether, do you think that desirable?—No, I think it advantageous there should be a deposit. In fact, I think myself that the section had much better be left as it is, except that I consider it a distinct improvement to say that during seven days the man shall have the right to appeal, instead of as at present having the right until the next Court day, which is really a very vague position. The period between Court days varies in different Magistrates' Courts, and in two days a man may lose his right of appeal.

1373. Why should he not have fourteen days in which to note an appeal instead of seven?—I have no objection to fourteen days, but it seemed to me that seven was sufficient. I would leave the rule in the Principal Act as it is, except that I would alter the period for noting an appeal to fourteen days, if that is thought better than seven days. With regard to Rule 8 of the Schedule, if you leave Rule 33 of the Principal Act as it is at present, then it is unnecessary, because you must still have "proper security for costs" standing in Rule 34 of the Principal Act. I do not know what the reason is for the amendment in Rule 9. I do not see why the words proposed to be omitted should be left out, and I do not think the alteration is necessary. It is introducing a principle of law that very probably obtains as it is under the common law. I would not complicate matters by trying to improve Rule 46.

1374. *Mr. C. J. Krige.*] With regard to the deposit, neither party gets advantage of that £1 17s. 6d.; it is meant for the Clerk of the Court. That is why the Promoters are not keen on retaining that?—After all it gives the Resident Magistrate's Court officials a good deal of trouble in preparing the record, and I think

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something should be paid. It does not seem unreasonable to make that deposit.

1375. *Chairman.*] What is your opinion with regard to section ten of the Schedule?—These rules would be necessary if the sections regarding civil imprisonment and distraint were necessary, but, as I have said before, in my opinion sections fifteen, sixteen, seventeen, eighteen, nineteen, twenty and twenty-one are unnecessary, and if they are omitted these rules under section ten of the Schedule will not be necessary.

1376. With regard to section eleven there is a long amendment?—As the amendment stands it seems to me to be a good and reasonable amendment.

1377. There is nothing here apparently which limits it to civil matters?—I think probably it would be held to apply only to civil cases, as in the Principal Act there are separate headings dealing with civil and criminal cases, and Rule 59 comes under the former. Personally, I think it would be an advantage if the Magistrate sent up his reasons in criminal cases. Rules 12, 13, 14 and 15 all carry out the intentions of the relative sections of the Bill. Rule 16 is all right. With regard to Rule 17, the Rule No. 35 referred to therein would not be repealed if you adopt the principle that the deposit is to remain. Those are all the notes I have.

1378. *Mr. Upington.*] Do I understand that you approve of Magistrates having jurisdiction in regard to mortgage bonds up to £250 and in regard to foreign judgments also?—Yes, I think so.

1379. Do you not think that would be rather a drastic reform?—I think it is in the interests of the public, and I do not think any difficulties that would be insuperable would arise when you can have appeals to the Supreme Court in such matters.

1380. The Magistrate cannot grant execution over landed property, and inasmuch as the principal object of the mortgage bond is that that execution can be granted, do you consider there is

anything practical to be gained by giving the Magistrate this increased jurisdiction in regard to mortgage bonds?—Probably you would not find that people would go before the Magistrate with their mortgage bonds, but if they wished to do so I would give them the opportunity.

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1381. With regard to the question of foreign judgments, very difficult questions might arise in connection with these?—Yes, but after all there are very few such cases, and I do not think it would be worth while to make it an exception, and as I say you have always got an appeal to the Supreme Court. The matter is so rare that I do not think it worth while considering it specially.

1382. With regard to sub-section (2) of section six, I do not think there is much difference of opinion there, but with regard to sub-section (3) you will agree, I suppose, that that is enlarging the Magistrate's jurisdiction in cases of counter-claims far beyond what it would be in cases of claims in convention?—I think the law is in a most unsatisfactory state as it is at present, and very few people know what the law is in matters of set-off and counter-claim, and this seems to me to provide a fair and reasonable working rule. I agree that it does enlarge the jurisdiction of the Magistrate, and it is quite right that it should enlarge that jurisdiction. Where a man has a claim of a certain amount I see no reason why the defendant should not put in a similar claim. It seems to me perfectly logical and perfectly reasonable.

1383. *Chairman.*] In what respect does it enlarge the jurisdiction?—The present law, with regard to claims in reconvention, is contained in section five of Act 43 of 1885. It only applies to anything brought in on a liquid document of over £100.

1384. The only point of this new sub-section (3) of section six is that it applies that rule of counter-claim to amounts claimed under £100?—Yes.

1385. It does not extend it to allow counter-claims for large amounts?—No.

1386. It brings into line and allows a counter-

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claim up to £100, which cannot be done now?—Yes.

1387. The present position seems to be illogical and unsatisfactory. If a plaintiff claims for over £100, then the defendant may counter-claim on any imaginable claim for a like sum, up to £250, but if the claim happens to be under £100 he cannot?—Yes. At the time when Act 43 of 1885 was passed, I do not think it was fully appreciated what effect it would have upon existing legislation.

1388. *Mr. Upington.*] To revert again to sub-section (1) of section six, it has been put to us that the main object of that particular sub-section is to bring in foreign judgments?—I thought the object was to make the list of documents referred to in the previous Magistrate's Court Act more complete. That was my idea, because they are not quite complete as they stand now. There is a wider definition of such documents than obtained before.

1389. With regard to section nine, did I correctly understand you to say that you were not in favour of increasing the facilities for imprisoning persons on account of civil liability?—I am certainly not in favour of it.

1390. I would point out to you that section nine certainly does that. Will not a warrant of civil imprisonment come under section nine?—I confess that when I referred to this section I was particularly thinking of it with regard to property, the execution of writs against property, and I think it very important that such writs should run in this way. I regard it as a very useful amendment with regard to property. I confess I had not considered it particularly from any other point of view, and I see now that it could also be used with regard to civil imprisonment against a person. Upon the whole, however, I am not prepared to say that that is unreasonable. I do not want the facilities with regard to costs or the length of period and so on in any way to be increased, but I do not think it is really unreasonable as it is. We

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have had cases where parties have had to come to the Supreme Court in order to get a remedy where a man has gone out of the district, and I think it is pretty clear he has gone out of the district in order to defeat his judgment creditor; and I am not prepared to say it may not be a good thing to allow a writ of that kind to be issued.

1391. The result would be that under this section you could inflict a great hardship. Take the case of a man who had left the district, not in order to defeat his creditor, but possibly for the purpose of earning the very money wherewith to pay him. You could, at the suit of a hard creditor, drag that man from, let us say, Mafeking to Cape Town, and put him in the civil debtors' gaol here? —I admit it might be oppressively used. It is a choice of two evils, and I think, on the whole, it might be better to confine it to property and leave it out with regard to persons. But I think it is a most useful and valuable amendment that these writs should be used with regard to property. When I gave my evidence at the outset I was not thinking of it from the point of view of the person.

1392. *Mr. H. S. van Zyl.*] New section five deals with civil imprisonment specifically?—I said at the outset of my evidence that I understood the real reason of that section was in order to get at people who had removed from a district by process of civil imprisonment. I also said it seemed to me that it might be used in many other ways, and that I thought there ought to be some safeguard put in that section to the effect that when the Magistrate took up the case, as he might do, some time after it had been originally brought before him, he should keep in touch with the defendant and that the defendant should have actual notice of what was going on. The case might stand over for a long time. In Cape Town, for instance, a case might sometimes stand over for six months and then be taken up again. Meanwhile the man may have gone to another district and have taken

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up another occupation, and judgment might be given against him by the Magistrate of the district from which he has removed and he know nothing about it. I think, therefore, a proviso should be put in this section that the Magistrate should always be satisfied that the man had had notice of the proceedings when he resumed the case.

1393. *Mr. Upington.*] With regard to section eleven, have you considered the question of the time that is allowed there?—The five days?

1394. Yes; the operation of that section stretches from the very north of Bechuanaland right down to Cape Point?—I had not considered the question of time specifically. With regard to that section, I said in the first part of my evidence that no difficulties had arisen to my knowledge under the present procedure. Now that you have pointed it out to me, I think five days is too short a time. However, as I said before, I do not see that there is much necessity for this section at all.

1395. With regard to section twelve, it has been objected to that section that it gives greater powers to a Court of Resident Magistrate than is now possessed by the Supreme Court?—But the Supreme Court surely has the power to attach property in the hands of third parties.

1396. Not in this summary manner?—I think the procedure does appear to be too drastic, but I think the principle is good. I think you should be able to get these attachments.

1397. You do not approve of the procedure?—No.

1398. You have acted on many occasions as Counsel for the Incorporated Law Society?—Yes.

1399. Can you tell me whether the Supreme Court has looked with favour upon partnerships between attorneys and law agents?—No, it has not. From time to time the Court has commented upon such partnerships and is not in favour of them.

1400. Are you aware what the practice is in the Transvaal in that regard?—No.

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1401. You are not aware that a short while ago an attorney was found guilty of unprofessional conduct for being in partnership with an unqualified person?—No, I was not aware of that. I take it that under this Bill such a partnership would not be allowed with a person who has no connection with the law at all. I have said before that I think it a pity that these sections are introduced into the Bill at all. I would rather see them cut out and dealt with in conjunction with the Law Society and not in a Resident Magistrates' Court Amendment Act. I refer to sections twenty-three and twenty-four.

1402. Have you considered this Bill generally with regard to the question whether it will increase or decrease the costs of litigation?—I think that very largely it will increase the costs of litigation in Magistrates' Courts, and with regard to most of the provisions making the proceedure so elaborate I think they had much better be left out of the Bill. I think that the first part of the Bill contains a considerable number of very useful provisions which it would be a great advantage to proclaim law as soon as possible. I refer to such sections as deal with the increase of jurisdiction, section six; the endorsement of the writ under section nine; the residence interpretation under section four; section seven, with regard to the referee; and also the sections with regard to the taking of evidence on commission and by interrogatories. All those, I think, are most useful matters. But with regard to a number of the other sections, which make the procedure more elaborate and increase the costs, I think it would be much better if they were left out of the Bill.

1403. *Mr. Oosthuisen.*] You say it will increase the cost of litigation in the Magistrate's Court, but will it not cheapen litigation to the public by their being able to go to the Magistrate's Court instead of as now having to go to the Supreme Court?—In so far as it increases the jurisdiction under section

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six I quite think it is a great improvement; but what I mean is that there are a number of sections in the Bill which give costs against the debtor, and the tendency of the Bill is to increase considerably the costs that may be exacted from debtors and others, and in so far as the Bill does that I think it is not an improvement. In so far as it increases the jurisdiction and therefore saves the public, I think it is of very great advantage and importance, especially section six. The sections I object to are certainly not sections that improve the position from the point of view of the public.

1404. *Chairman.*] It also tends to increase the Magistrate's Court fees?—Yes, and I am not prepared to say that that is a good thing.

1405. *Mr. Oosthuisen.*] It puts the creditor in a better position?—In a much better position, whether he is the landlord distraining or the creditor proceeding for the imprisonment of his debtor. It tends to exact the last penny from a man who is in an unfortunate position, and I think the tendency of our modern civilization does not go in that way. I know that the tendency of legislation in England is very much in the opposite direction at the present time, and I think rightly so. They have lately had a Commission in England on this very question of civil imprisonment, and I have read the report of the Commissioners upon it. There is a good deal of valuable information to be found in that report, which was made a few months ago.

1406. *Chairman.*] They recommend the abolition of civil imprisonment?—No, not quite that. They say it is impossible to abolish it. There was a great outcry for its abolition, and the Commission wished to limit it considerably from what it was, but they were practically unanimous that it was impossible to abolish it. They recognised it had become a great evil, as was evidenced by the enormous number of people imprisoned for debt in England.

1407. *Mr. Oosthuisen.*] With regard to the

section where it provides that a summons can be issued to restrain the tenant from removing the furniture distrained, do you approve of the summons being obtained from a Justice of the Peace? —I do not approve of that section nineteen. I think it better to leave the law as it is. Mr. M. W. Searle, K.C. — Nov. 24, 1909.

1408. *Mr. Louw.*] Have you considered the point that the action taken up on the question of attorneys and admitted law agents working together shows selfishness on the part of the profession?—I would say that self-preservation is the first law of nature. I have said that there are certain sections of the Bill which appear to have been put in in order to increase the costs of litigation and which are not to the advantage of the public. On the other hand I think there are a great number of very valuable sections in the Bill from the point of view of the public, and which will assist the public distinctly, and I have endeavoured to state what those sections are. I would not like to condemn the Bill wholesale, and I think the sooner the Bill is made law in respect of those sections to which I have referred the better.

1409. *Mr. D. M. Brown.*] With regard to section four, more than one witness has suggested that the words "or being employed" should be struck out; what do you think of that suggestion?—After all it seems to me that if a man is employed in business he practically has a business. The idea of this section is to give a man, so to speak, a business domicile for the purpose of citation; to give him a business domicile apart from his residential domicile.

1410. A man might be living in Wynberg, where he gets groceries, for instance, and he might be employed in business in Cape Town. Do you think those words should be in or not?—I think, upon further consideration, that those words go too far, and it would be better to cut those words out. The Transvaal Magistrate's Court Act does not go so far as that. I have looked up that Act and I see it does not include the case of

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a man who is an employee. I think it would be better to confine it to men who have actually established businesses of their own.

1411. As regards section six, do you think £50 sufficient? Do you know it is £100 in the Transvaal and Orange River Colony, and £300 in Natal? —Yes, I am aware that that is so, and personally I must say I think you might possibly go a little farther. At the same time I know that it is always better to proceed cautiously. And you are making a big jump from £20 to £50. Of course, the Principal Act was passed more than fifty years ago, and I suppose the value of money has doubled in the time. Supposing it has doubled, that would make £40 now the same value as £20 then. And, of course, we have a better class of Magistrate now than we had in those days. At the same time I think that, for a fair compromise, £50 is a reasonable figure. I do not think it ought to be less than £50; that is the minimum advance in my opinion, and I consider that a fair compromise.

1412. Are you aware that civil imprisonment has been abolished in Scotland for nearly thirty years, except in paternity and alimony cases, and arrestment of wages substituted?—No, I was not aware of that. I am not in favour of strengthening the facilities for civil imprisonment in any way whatever.

1413. Have you ever heard of the arrestment of wages?—Yes, I think I have now that you have reminded me of it.

1414. Do you not think it would be more humane to substitute that for civil imprisonment? —I would prefer not to give an opinion at once. I would rather look into the subject carefully before giving an opinion. I am not sufficiently acquainted with the subject to be able to give an opinion straight away.

1415. The average of Magistrate's Court writs do not realise anything like £10 when executed by the Messenger. Do you not think it would be

advisable, instead of selling a man up, that the Magistrate should have the power to stop the sale subject to the payment of so much per week?—To prevent distraint for rent? Mr. M. W. Searle, K.C. — Nov. 24, 1909.

1416. No; so that the furniture should be left with the person, who would be liable to imprisonment for its removal?—That is also a matter that one would like to consider carefully, as to what extent the law could be amended. As I said before, I am not in favour of any further facilities with respect to distraint, but I have not considered whether it would be advisable or safe at the present time to abolish the provisions for sale for non-payment of rent or otherwise, I think it would perhaps be rather drastic and going too far the other way if you prevented the creditor from getting his remedy. There are also cases of hardship on the part of the creditor.

1417. With regard to section nineteen, the meaning of this section, as I understand it, is that the surety bond should be able to be signed before a Justice of the Peace. At the present time in some cases people have to travel 100 miles or more to the Magistrate's Court. The present section only provides that a Justice of the Peace may do that?—The part I would leave out of that section is the first part referring to costs. But I do not think Justices of the Peace are there for the purpose mentioned in this section, and I do not think any such functions have hitherto been entrusted to them in this country, so that I do not view the rest of the section with favour. I do not want to make the way of the landlord too easy either in these matters.

1418. As regards section twenty-two, are you aware that about 800 attorneys have been admitted within the last ten years, and that among those there are men who cannot find places in which to practice, and do you not think it will be a bar to them finding places to practice in if more law agents are to be admitted?—What I feel is that there may be a hardship in cases of

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small villages and townships gradually springing up to which only one attorney may go. There may not be enough work to support two attorneys, and in those cases you would absolutely debar the public from legal assistance if you would not admit a law agent.

1419. I do not think that quite answers my question?—I admit there are a large number of attorneys admitted every year, but I do not think that the number of attorneys admitted each year has been so great that it is reasonably certain that two attorneys are to be found everywhere in all small villages.

1420. *Mr. H. S. van Zyl.*] Does not the law give attorneys sufficient protection now, inasmuch as where there are two attorneys practising in a place you cannot admit a law agent?—Yes. I am looking at it from the point of view of the public, and I am not sure that the point of view of the public is sufficiently protected under this section.

1421. You know that in the small villages, if they fall within a fiscal division and there are two attorneys practising in the principal village of the fiscal division, you cannot get a law agent admitted in the small village where there is an Assistant Resident Magistrate or where a Periodical Court is held?—Yes, that is so. I pointed out at the outset of my evidence that I thought the provisions at present in existence with regard to the admission of law agents were sufficiently stringent, and I also remarked on the limited position of the law agent now admitted. He cannot practice anywhere except in his own place.

1422. *Mr. D. M. Brown.*] With regard to section twenty-three, it has been stated in evidence that persons who have been admitted as law agents in Wynberg have come into Cape Town and put up a plate "Enrolled Agent," with "Wynberg" away down in the corner. They do not appear in the Court at Cape Town, but they do all the other business. They take fees and issue letters of demand. What law will meet that?—Is it quite

clear that that is what is meant by section twenty-three ?

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1423. Does the existing law meet it ?—Yes, I think it does, but I do not think this section twenty-three does.

1424. *Mr. H. S. van Zyl.*] The law agent has no privileges outside appearing in the Magistrate's Court ; there is nothing he can do which any other ordinary agent cannot do outside the Magistrate's Court ?—That is so, but I take it that what people would object to would be his preparing a case or having part in the issue of a summons or the issue of a warrant or writ, or sharing the costs in such matters in Cape Town when he was really enrolled in Wynberg.

1425. In matters outside the Court he has no privileges above an ordinary agent ?—That is so, but you can quite imagine that he can do these objectionable things in Cape Town under the pretence that he is a duly qualified agent in Cape Town. I think the common law would meet the case, but I doubt very much if this section would meet it.

1426. *Mr. D. M. Brown.*] With regard to appeals within three months, do you not think the right of appeal should be given to the second Circuit Court ?—I think it would be rather a hardship a man should have to wait six or seven months. It would be rather hard on the respondent in a Magistrate's Court appeal that it should be kept open until the second Circuit Court. I think it is going rather far in favour of the appellant to say he can take up to the second ensuing Circuit Court. Do you mean you would allow him seven or eight months in cases ?

1427. Yes, in cases, but it would not be more than that ?—I think that is too long. The Supreme Court has intimated that it regards a period of eight months as an unreasonable period.

1428. *Mr. W. P. Schreiner.*] For simple delay ?—Yes. I should not be in favour of such a lengthy postponement as to the second Circuit Court.

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1429. *Mr. D. M. Brown.*] In regard to section thirty, the English law gives the accused a chance of intimating to the Attorney-General how he would wish to be tried ?—I have said that I do not think there is really any substantial hardship under the law at present, and I am not in favour of altering it.

1430. Would you allow a question to be put to the accused, "Do you wish to be tried by a jury"? —I do not like the idea. I prefer to leave the position as it is.

1431. Returning to section nine, it is generally felt in the Committee that it would be a very great hardship for a writ of civil imprisonment to follow a man, but the point has been brought up particularly in connection with the Cape Peninsula. Would you not make that writ extend say within 25 miles of the Magistrate's jurisdiction? In the case of a summons issued in Cape Town, a man just crosses the street and he is in the Woodstock district, and the proceedings against him must commence *de novo*. Would you approve of an extension to within 25 miles?—You might say within 10 miles. I do not know why you say so much as 25 miles.

1432. There is Cambridge outside East London, Uitenhage outside Port Elizabeth, and Simon's Town in the Cape Peninsula?—I think 10 miles would be sufficient. In populous areas there might be a difficulty, which might be got over by putting in 10 miles.

1433. Do you know anything about Messengers? —Not a great deal.

1434. It has been stated that Messengers have to serve summonses in some cases at distances up to 200 and 300 miles, and that that is done by posting the summons to a deputy, who gets a small sum— 5s. I think—and the Messenger charges full fees. It has been suggested here that the Magistrate should have power to appoint Messengers for various districts so as to save the cost of service? —I think it is a great advantage to have one man

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who is responsible over a large district. The duties are responsible duties.

1435. What about the cost to the unfortunate man getting the summons?—I prefer to have one man over the district. Sometimes there are actions brought against the Messenger, and he should be a man of substance and a responsible man. I do not think it would be a good thing to divide up responsibility.

1436. *Mr. W. P. Schreiner.*] What do you think of the machinery of a registered letter for effecting the service of process?—I am inclined to think it might be done.

1437. You are aware that such matters as judgments and orders of the Supreme Court are again and again authorized to be sent to foreign countries by registered letter; why in our own country should we not reduce the expenditure in litigation by allowing a person to take the risk of proving he has served a process by registered letter personally?—You would have to lay down certain rules as to what the service was. Is the idea that merely putting the registered letter into the post and producing the counterfoil is sufficient proof of service?

1438. If a person likes to take the risk of service by registered letter, he will have to produce the signature of the defendant party who receives the registered letter. The defendant does not know what is being sent to him, and he signs the receipt for the letter and hands it to the Post Office, and you identify the service of process in that way?—I see no objection to that. I think in many cases you would not get your receipt, but it might be worth while doing it.

1439. The Post Office receipt would be returned to you. It would involve this difficulty, that the Post Office does not like to be made the hand of justice. The Post Office objects to being used in that way, but from a legal point of view do you see any objection?—No. I think it would require arrangement with the Postal Department, and very

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likely the Postal Department would have some objection to their officials acting as Messengers.

1440. *Mr. H. S. van Zyl.*] How about a case where there is no post at all?—It could not be applied everywhere; it could only be done in certain cases. Where the plaintiff chose to take the risk it might be done in certain cases.

1441. *Mr. W. P. Schreiner.*] The Court would still have to be satisfied that the defendant party understood the process, because a Messenger has to explain the nature of a process when he serves a summons. But I am taking it that the plaintiff can prove that the defendant really understands the nature of the process?—I do not think you could insist on the postman waiting to explain the contents of the letter.

1442. If the defendant party is a person who thoroughly well understands the process, as well as you or I, that might be deemed to be a satisfactory service of process?—Yes, in certain cases.

APPENDIX.

[A.]

STATEMENT OF THE VIEWS OF Mr. W. T. BUISSINNÉ IN REGARD TO THE BILL.

Paragraph 24. I most strongly object to paragraph 24. I wish to put the matter quite fairly before this Committee however.

A meeting of certain five members of the Council of the Incorporated Law Society was held on Saturday morning last to consider this Bill. This special section, *inter alia*, was discussed. Two of the members, of whom I was one, object totally to a partnership between an Attorney and a Law Agent. Three, constituting the majority present at that meeting of the Council, reluctantly agreed that they would not object to a partnership between an Attorney and a Law Agent provided only that the Law Agent did not share in any fees earned by the professional partner either as Attorney, Notary or Conveyancer, that is to say that the sharing of fees should only subsist as far as the fees earned in the R.M Court were concerned.

I strongly protest against any partnership between a qualified and an unqualified man. The Bill as originally drafted, permitted even an Advocate and Attorney to go into partnership, but on this point the promoters have since given way, and have provided an amendment.

In my opinion there is greater objection to a partnership between an Attorney and an enrolled agent, than between an Advocate and an Attorney, and the same objection as there would be to a partnership between a Doctor and a Chemist, and I sincerely trust that the Legislature will refuse to pass this Clause.

It has been my object, and still is my sincere desire to raise the standing of my profession, and the educational test for admission to its ranks, thereby providing better security to the public. If I agree that it is possible for an Attorney to go into partnership with an unqualified man, I lower the status of my profession, which I am dead against.

I do not wish to be misunderstood,—I am quite aware that there are agents as capable, and with as keen a sense of honour, as any Attorney, but we are not legislating for isolated cases, we are legislating for the whole body, and if my idea is fulfilled in the near future the Attorney who is admitted hereafter will be a man who is infinitely better educated than he has been in the past.

He will first of all not have been articled until he had matriculated, he will be forced to serve five (5) years and will be compelled to pass in addition to the examination he is now called upon to write, an examination which will entitle him not only to reckoned a lawyer, but an educated gentleman, competent to take his place amongst men of light and leading. The partnership, even qualified as some of my colleagues on the Council think possible, is in my opinion most objectionable.

It is my wish to raise the educational test to more or less the level of the bar, rather than sink it to the standing of a calling which requires no qualification, and no legal training whatever, and the partnership contemplated by the Act is calculated to have this effect.

W. T. BUISSINNÉ.

[B.]

PROPOSED AMENDMENTS TO THE BILL BY THE COMMITTEE OF LEGAL PRACTITIONERS.

Provincial Chambers,
14, Keerom Street,
Cape Town,
22nd October, 1909.

The appended amendments to the Bill have been passed by the Committee :

C. Christian Silberbauer,
Chairman.

Section five.—To delete section five, and to substitute :—

"The jurisdiction of any Court of Resident Magistrate out of which a summons in any suit has been served shall not be ousted by reason only of the defendant having subsequent to the service of such summons removed beyond the boundaries of such Magisterial District and of his having ceased to reside, or carry on, or be employed in business in such district but shall continue to exist until the full end and determination of the suit, provided however that if a summons calling upon any defendant to shew cause in such Court why a decree of civil imprisonment should not be pronounced against him, shall be issued out of the Court of such district after he has removed therefrom as aforesaid, the said summons shall be transmitted to the district in which he shall reside, or shall carry on, or be employed in business, and shall there be served in like manner as that provided in section fifty-two of the Principal Act, for the service of a summons upon a witness residing or being in a district other than that from which such summons shall have been issued."

Section seven.—Line 42, the words "the whole cause" deleted.
Line 43, the words "tried and" deleted.

Section twelve.—Line 34, the words "or part owner" deleted.

Section twenty-one.—To delete section twenty-one and to substitute the following :—

21.—The proviso in the thirty-second section of the Principal Act is hereby repealed and the following is enacted in lieu thereof :—

Provided always that it shall be competent for the tenant at any time before such sale to pay the amount of rent due and in arrear together with such further sum as the Magistrate shall tax and allow for such costs and charges as have been incurred in and about the order, and for the costs and charges to be incurred by the Messenger in connection with such seizure and arrest, as aforesaid and thereupon the movable property arrested shall be restored.

Section twenty-two.—Line 37 to read "person."
Line 38 to read "an agent."
Line 39 the words "and enrolled" deleted.

Section twenty-four.—At end of Section Twenty-four to add :—

"Nothing in this section shall be construed as to permit any attorney being in partnership with any advocate of any of the Superior Courts of this Colony.

Section twenty-five.—Delete last sentence and add :—

"The Resident Magistrate of the Court in which any agent shall be enrolled shall hold an inquiry into any charge of misconduct brought to his notice or preferred against such agent, and shall secure the attendance of all witnesses in support of such charge, or of any other witnesses whom the agent may desire to call on his behalf, and shall take the evidence of such witnesses on oath and record the same. Upon the completion of the record of the evidence so adduced at such inquiry, the Magistrate shall forward such record to the Attorney-General who shall, if he be satisfied that a *prima facie* case of misconduct appear from the record, forward the record to the Registrar of the Supreme Court with the request that the case may be set down for hearing. The Registrar shall then set the case down for hearing, and shall notify the Attorney-General and such agent of the day appointed for the hearing. Upon the day appointed for the hearing, the Court may, after the record has been read, and after considering such further evidence as may have been tendered, and after Counsel for the Attorney-General and such agent respectively have been heard, make such order as it may think fit."

Section twenty-six.—Delete and substitute :—Sections thirty-eight and thirty-nine of the Principal Act are hereby repealed, and the following section enacted in lieu thereof—

"The party, whether plaintiff or defendant, in whose favour any judgment of any Court of Resident Magistrate in any civil action or proceeding shall be pronounced, shall be allowed in the taxation of costs against the opposite party such fees and disbursements of the agent or attorney of the successful party as may have been reasonably incurred in and about the prosecution or defending of the action or proceeding, and on the scale provided by the tariff of charges which may now or in future be framed ; in the absence of such provision in respect of any fee or disbursement, the Clerk of the said Court shall allow such sum as shall appear to him reasonable and not prohibited by any rule of Court. Provided that nothing herein contained shall be construed so as to deprive any such Court of any discretionary power which it may now by law possess to refuse costs to any suitor to whom it would in the judgment of such Court be inequitable to allow the same."

Section thirty.—Add :—

"Provided that if such accused shall have elected to be tried by a Court of Resident Magistrate and the offence with which he is charged or upon which the Attorney-General shall decide to indict him is one in respect to which such Court does not possess jurisdiction, then in such event the provisions of this Section shall not apply."

Section thirty-two.—Line 66, delete "shall."

Line 67, after "Magistrate" insert "may."

Section thirty-three.—Line 9, delete "shall," substitute "may."

Section thirty-four to read :—

34. And whereas it is expedient to add to and in some particulars amend the rules, orders and regulations respecting the manner and form of proceeding in civil and criminal cases before the Courts of the Resident Magistrates : Be it enacted that every rule, order and regulation in the schedule to this Act contained shall be deemed and taken to be of the same force and effect as if the same had been embodied in so many enacting clauses of this Act."

Section "thirty-four" to read "thirty-five."

Schedule.

Rule 7.—Delete last sentence and substitute :—

"The said Rule 33 is further amended by the deletion of all words from the words 'and the party appealing shall then deposit' to the end of the Rule."

Rule 11.—To be deleted and following substituted :—

"Within four days after an appeal has been noted the Resident Magistrate shall frame and attach to the record of the proceedings the statement of facts which he shall find to have been proved and his reasons for the judgment pronounced in the case ; the Clerk of the Court shall transmit the record of the proceedings, together with the said statement and reasons, to the Registrar of the Court to which appeal is being made, within seven days after such appeal shall have been noted, notwithstanding anything to the contrary contained in Rule 59 of Schedule B of the Principal Act. Thereupon the appellant shall be required to prosecute his appeal within three months after such appeal shall have been noted."

Rule 12.—Delete word "trial," and words "try and."

Rule 17.—Verbal alterations have been made.

[C.]

LETTER FROM MR. W. T. BUISSINNÉ ON PRACTITIONER'S FEES.

Cape Town,
4th November, 1909.

To the Chairman of the Select Committee on the Resident Magistrate's Court Amendment Bill, Houses of Parliament, Cape Town.

Sir,

I venture in connection with the evidence which I have given before the Select Committee on the Resident Magistrate's Court Amendment Bill, to draw your attention to two cases reported in the Official Reports of the High Court of the South African Republic. One was decided in 1894, and is reported in Vol. I. page 202, Transvaal Law Reports, in the matter of the Incorporated Law Society, versus van Driel, where it was held that a practitioner of the Court is prohibited from sharing his fees with, or disposing of them, for a fixed salary, to an unqualified person, or persons. Chief Justice Kotze was the presiding Judge.

The other is also reported in the Transvaal Law Reports, for 1902, page 11, in the matter of Pienaar and Versfeld versus the Incorporated Law Society.

I have, etc.,

W. T. BUISSINNÉ.

[D.]

LETTER FROM COMMITTEE OF LEGAL PRACTITIONERS FOR THE AMENDMENT OF ACT NO. 20, OF 1856, AND REFORM OF MAGISTRATES' COURT PROCEDURE IN REGARD TO THE BILL.

Provincial Chambers,
14, Keerom Street,
Cape Town,
18th November, 1909.

To the Clerk,
of the House of Assembly,
Cape Town.

SIR,

We have the honour to inform you that we have, in accordance with the permission given by the Hon. the Speaker, and in terms of your letter to Mr. C. C. Silberbauer, dated the 15th instant, been afforded an opportunity of considering the evidence given by him, as the Chairman, and by Mr. W. B. Shaw, as the Hon. Secretary of this Committee, before the Select Committee to which the Bill, introduced by Mr. C. Joel Krige, M.L.A. to amend the Law relating to Magistrates' Courts, was referred.

We should feel obliged if you would be so good as to have it brought to the attention of the Select Committee that we are in accord with the evidence given by them on behalf of this Committee.

We have, etc.,

JOHN R. LANCASTER.
HENRY B. LOW.
FRED B. ANDREWS.
C. BRADY.
E. J. BOYES.
G. A. DE KLERK.
A. J. MACCULLUM.
C. A. W. COULTER.

[E.]

SYNOPSIS OF REPORTS BY RESIDENT MAGISTRATES ON THE BILL.

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1. In the interpretation of this Act the term "Principal Act" shall mean "The Resident Magistrates' Court Act No. 20 of 1856."

2. So much of the Principal Act or any other law as is repugnant to or inconsistent with the provisions of this Act is hereby repealed.

3. From and after the taking effect of this Act the Principal Act shall be read and construed as by this Act amended.

4. Notwithstanding any construction or interpretation that may hitherto have been placed upon the words "person residing" in the second and third lines of section eight, Act No. 20 of 1856, such words shall be held to mean and include any person, partnership, company, corporation or other corporate body domiciled, residing, carrying on or being employed in business within a district for which a Resident Magistrate shall have been appointed.

Clauses One to Three. Nil.

Clause Four. Considered a reasonable reform. Should make provision for persons casually resident elsewhere. If it means that a Corporation or Joint Stock Company can be sued in any district where it has a branch business, the change is not desirable. Simonstown thinks the clause unnecessary, as the words "person residing" have been dealt with in a number of decided cases, *e.g.*, Maarat *vs.* Hickson & Co.; Harris *vs.* Blore; and seven others. Alexandria suggests that the words between "prison" in 3rd line, and "within" in the 5th line should be deleted, and the words "residing or carrying on business" substituted. The words "and third" should be deleted, as the words "persons residing" do not occur in the third line of section eight of Act 20, 1856. Mafeking sees no necessity for this Clause, as section eight of Principal Act works very well as it stands. Victoria East thinks it should be deleted. Port Elizabeth considers that it should be stated that service may be made on the local representative of any firm. At present no firm whose head office is not in the Colony could be sued except by the cumbersome and expensive process of attaching property to found jurisdiction.

5. Whenever in any civil suit the defendant shall at the institution thereof be subject to the jurisdiction of the Court of Resident Magistrate out of which the originating summons or process shall have been issued, then for the purposes of such suit the jurisdiction of such Court shall not be ousted by reason of the defendant at any time after such institution removing without such jurisdiction.

Clause Five. Of great benefit to creditors. An obvious improvement tending to prevent a defendant from taking advantage of existing vagueness in the law on the point. Suggested that Clause five be deleted and the following substituted :—"The jurisdiction of any Court of Resident Magistrate out of which a summons in any suit has been served shall not be ousted by reason only of the defendant having subsequent to the service of such summons removed beyond the boundaries of such Magisterial District and of his having ceased to reside, or carry on, or be employed in business in such district, but shall

continue to exist until the full end and determination of the suit, provided however that if a summons calling upon any defendant to shew cause in such Court why a decree of Civil imprisonment should not be pronounced against him, shall be issued out of the Court of such district after he has removed therefrom as aforesaid, the said summons shall be transmitted to the district in which he shall reside, or shall carry on, or be employed in business, and shall there be served in like manner as that provided in section fifty-two of the principal Act for the service of a summons upon a witness residing or being in a district other than that from which such summons shall have been issued."—Queenstown.

6. The jurisdiction of Courts of Resident Magistrates shall be extended in manner as follows :

(1) To all cases founded upon any liquid document sufficient to found a claim for provisional sentence in the Supreme Court in which the sum demanded shall not exceed two hundred and fifty pounds sterling.

(2) In all cases in which the jurisdiction has hitherto been limited to claims not exceeding twenty pounds sterling, such limit shall be raised to fifty pounds sterling.

(3) As often as any action or suit shall be brought, the Court shall have jurisdiction to try any plea, set-off claim in re-convention or cross case the amount of the demand or claim of which would be ordinarily beyond the jurisdiction of such Court, provided that under such circumstances the amount of such demand or claim shall not exceed the amount of the claim or demand in convention. Nothing herein shall affect the right of a defendant to claim in re-convention any amount in excess of the amount of the claim in convention, provided that such claim in re-convention is one ordinarily within the jurisdiction of the Court.

Clause Six.—Jurisdiction of Magistrates in Civil cases might safely be increased as proposed. Section three seems unnecessary ; *vide* De Wet *vs.* Theron, 16 Juta 421. Amount might safely be raised to £100, and thus do away with fine distinction between *price* of goods sold, etc., and other illiquid claims. Section three does not do away with anomalies contained in Clause Four, section eight, of original Act, which section has been a stumbling block in the past to Court and practitioners and a hardship on the public. Increased jurisdiction in Civil suits will supply a long-felt want. Sections one and two are not sufficiently explicit and should be clearly stated. In section three it is suggested that the words, "the amount of the demand or claim of which . . . . the amount of such demand or claim shall" be deleted as they serve no useful purpose. Calvinia strenuously objects to raising of Magistrate's jurisdiction from £20 to £50 ; he

maintains that under present system, with a few exceptions only, Magistrates do not possess sufficient legal education, training and experience to render it advisable to increase their jurisdiction in any respect. Suggested to substitute the same jurisdiction as now exists in Transvaal Magistrate's Courts. George thinks time has arrived for extending ordinary jurisdistion of Magistrates. Philipstown thinks paragraph 1 ought to be omitted. Richmond thinks the increased jurisdiction should only apply to Magistrates and not Assistant Magistrates. Barkly West sees no reason why section eight sub-section (1) of Act 20, 1856, should be departed from.

7. In any suit which can be heard and decided by a Court of Resident Magistrate wherein the dispute consists wholly or in part of matters of account, or the cause requires prolonged examination of documents or scientific, technical or local investigation which cannot be conveniently effected by a Court or Resident Magistrate, such Court may at any stage of the suit order the whole cause or any relative question or fact to be tried and investigated by an official referee to be agreed upon by the parties to such suit or failing such agreement to be appointed by such Court. Such referee shall report in writing to such Court what facts have been established by his investigations, and if required of him the decision or decisions at which he has arrived upon such facts. Such report and decision may be rejected or adopted wholly or partially by such Court with or without amendment as such Court may elect and may be so made a judgment of such Court, which may also remit a referee's report to him for amplification or further consideration. An official referee shall be appointed by instrument in terms, as near as possible, of the form provided in Rule 12 of the schedule hereof.

Clause Seven.—Suggested that words "whole cause" in line 5 and "tried and" in line 6 be deleted. Provision should be made to fix amount of fees payable to referees and of other concurrent expenses. May be of use in large towns but doubtful whether applicable to small country stations. Legal advisers should be allowed to be present when matter is investigated by referee. Alexandria does not see the advisability of employing an official referee unless his report and decision are to be accepted in the same light as an arbitration. The main objection to this Clause is on the ground of expense. Fort Beaufort suggests that matters relating to Native Custom be excluded from this Clause. Victoria East does not consider the Court should have the right to reject, either in whole or in part, the referee's decision. Peddie is not in favour of this Clause but if a referee is appointed he considers that the Court should not have the right of rejection of his decision. If his decision is rejected, what will the position be? Will a fresh referee have to be appointed? Would it not be better in the first instance to have the referee in open Court, examine and cross-examine him?

8. Section Thirty-four of the Principal Act is hereby amended by the substitution of the words "fifty pounds" wherever the words "forty pounds" or "twenty pounds" appear therein.

Clause Eight. Simonstown says:—"No objection. This further increases jurisdiction of Magistrates. The general tone of this Bill is much more work for Magistrates but no more pay; much more work for practitioners in Resident Magistrates' Courts with increased emoluments." Alexandria and Barkly West suggest that the words "one hundred pounds" be substituted for "fifty pounds." Calitzdorp suggests the substitution of the words "two hundred and fifty" for "forty," and "fifty" for "twenty."

9. Whenever any writ or warrant in execution of a judgment or decree of a Court of Resident Magistrate shall have been issued out of such Court and it shall appear that the party against whose property or person such writ or warrant is directed has no or insufficient movable property within the district of such Court wherewith to satisfy the exigency of such writ or warrant or it shall appear that the said party does not reside or cannot be found within such district, then and in either case such writ or warrant when endorsed by the Resident Magistrate of any other district (and every Resident Magistrate shall be required on being requested to endorse such warrant to do so) shall have the like force and effect in every respect as if it had been issued originally out of the Court of the Resident Magistrate last endorsing same.

Clause Nine. Seems same in effect as section thirteen, Act 20 of 1856, and therefore unnecessary. Another Resident Magistrate considers it an excellent provision, and likely to remedy a great defect in old Act. Would it not be desirable to make provision in case the defendant removes to another district *after* return of *nulla bona* made and *before* be can be summoned to show why a decree of civil imprisonment should not be granted against him? Alexandria considers the wording of section fifteen of the Transvaal Act preferable. Mossel Bay thinks provision should be made for the endorsement of warrants of civil imprisonment.

10. The term "movable property" and "movables" whenever used in the Principal Act and subsequent Acts dealing with civil process of Courts of Resident Magistrate including this Act shall be held to include cash or its equivalent certificates of shares of companies and corporations and every class of effects and property other than immovable property.

Clause Ten.—When read in conjunction with Clauses Twelve and Thirteen may lead to many vexatious proceedings in regard to money supposed to be in a Bank, a Government Savings Bank, with Board of Executors or Trust Company, or in regard to scrip in the hands of a Bank or Broker. Great difficulty will be experienced in actual attachment, and messengers should

be definitely instructed by statute or rule of court. A useful measure, as it is not always convenient to revive a judgment. Suggested that Clause should stop at word "Corporations." Considered no improvement on original Act. The time allowed for giving notice is too short for rural parts. Cradock considers this clause necessary and deserving of approval. Grahamstown puts the question, "Is this provision intended to cover the case of incorporal things such as the rights of action? A messenger having attached a promissory note, could he sue on it when the time for payment arrived?" Graaff-Reinet thinks "movable property" should be more clearly defined.

11. The fifty-third section of the Principal Act shall be amended and amplified by the following provisions:

> Whenever any person (not being the party in execution of the judgment against whom process has been issued) shall make a claim to or in respect of any movable property taken in execution, the Messenger who has taken in execution such movable property shall notify the judgment creditor of such claim. If within five days after such notification the judgment creditor shall not have consented to the release of such movable property from execution the person claiming shall within seven days from the last day of the said five days cause a summons to be issued out of the Court which granted the judgment, in execution whereof such movable property has been attached, calling upon the judgment creditor to show cause why such movable property shall not be declared not executable for the said judgment, and if such person claiming shall not cause such summons to be issued within the said seven days, then shall the Messenger proceed with the sale in execution as if no claim had been made.

Clause Eleven.—That provision be added to the effect that if judgment creditor fails to show goods are executable the Court may if it see fit award double costs to successful claimant. Very necessary amendment and will obviate present difficulty in which Messengers often find themselves after attachment. Will be a source of inconvenience to litigants, as parties concerned may be illiterate and live great distances apart and the notifications suggested will be subject to the vagaries of country posts unless served by the Messenger and thus entailing further expense. Suggested that the words "or under any other order of attachment" be inserted after the words "taken in execution" in line three. In fifth line "five days" seem too short a time and it is suggested that "ten days" be substituted. Claims to property seized by a Messenger of the Court should be by affidavit to prevent bogus claims. Rule 8 of Schedule B to Act 20, 1856, should be amended to agree with this Clause. It should be made clear that the party claiming the goods attached should either himself

or through an Agent or Attorney issue summons against the plaintiff creditor and make all the necessary disbursements which disbursements he can if successful recover from the plaintiff creditor. Under the existing law the question often arises as to who is to make the necesssary disbursements before summons is issued. It is suggested that instead of the Messenger the claimant should notify the judgment creditor who must either release the attachment within seven days after receiving notice of the claim or forthwith summon the claimant to substantiate his claim. Kimberley considers existing law on this point is preferable. Middledrift considers the present procedure in interpleader cases as far more expeditious than that indicated by this Clause. Klipdam, however, thinks the provisions of this Clause as far more satisfactory than the existing law on the point. It is not understood why 7 days' grace is allowed the claimant and only 5 days the creditor. Peddie thinks this Clause does not "amend and amplify" the fifty-third section of the Principal Act, but lays down an entirely new procedure in regard to the preliminary steps of an interpleader action. If this Clause remains the fifty-third section of the Principal Act should be repealed altogether to prevent possible confusion.

12. Whenever a judgment creditor whose claim has not been satisfied by the judgment debtor or on his behalf shall know or have good reason to believe that such debtor is the owner or part owner of movable property, in the possession of a person, not a party to the suit between the said creditor and debtor, or if a party not the judgment debtor, then shall such judgment creditor be entitled to apply to the Magistrate who adjudicated upon such suit for a warrant under his hand authorizing the Messenger of the Court to attach such movable property or the part or parcel thereof the property of the said debtor. Every such application shall be supported by an affidavit of the judgment creditor wherein he shall state either that he knows or has good reason to believe (in which event he shall state fully such reason and the ground thereof and may be supported by an affidavit or affidavits of one or more other persons in corroboration of such reason or of the ground thereof) that the judgment debtor is the owner of certain movable property (describing same with as much detail as he the said creditor can) which is in the possession of a person either not a party to the said suit, or if a party not the judgment debtor. Thereupon the said Magistrate shall, under his hand, issue to the said Messenger a warrant authorizing him to attach such movable property or sufficient thereof to cover the amount of the judgment debt and costs specified in the said warrant and his charges thereabout. Every such warrant shall be as near as possible according to the form Rule 13 of the Schedule to this Act.

Clause Twelve.—An excellent proposal to prevent judgment debtor from placing goods in custody of third parties to avoid attachment. Piquetberg considers this Clause undesirable;

present Act sufficient. Suggested that "shall" in line 15 be altered to "may."—Suggested that this Clause be extended so as to embrace section forty-six, Schedule B, of the Transvaal Proclamation 21 of 1892.—In line 34 the words "or part owner" to be deleted.—Cradock, Kimberley, Middledrift see no necessity for this Clause.—Kuruman suggests that in line 6, after the word "suit" the words "his successor or assistant" be inserted.

13. The Messenger in the execution of such warrant shall attend upon the party in whose possession the movable property to be attached may be, and shall attach the same or sufficient thereof to satisfy the exigency of the warrant and his charges. The Messenger shall prepare an inventory of what he shall attach and shall deliver a copy thereof to the party in whose possession the attached movable property may be, together with a notice in terms of Rule 14 of the Schedule to this Act, a copy of which notice shall also be delivered to the judgment debtor. The Messenger shall remove the movable property attached and retain same in his possession pending sale or release, or leave the same upon the premises where found in the custody of some person by him appointed for the purpose, unless the party in whose possession such attached movable property may be or the judgment debtor shall find security in terms of Rule 44, Schedule B, of the Principal Act. Any party objecting to the attachment in satisfaction of the judgment creditor's claim of the attached movable property shall within ten days after the date of such attachment notify the said Messenger in writing of such objection and the ground thereof. The Messenger shall then without delay notify the judgment creditor of such objection, and the judgment creditor shall within five days after receipt of such notice consent or refuse to release the attached movable property. Failing such release the party objecting shall issue process as provided in the Principal Act as amended by sections eleven and twelve of this Act.

Clause Thirteen.—In last line the words "and twelve" should be deleted as Clause Twelve does not seem to apply to the disposal of the attached property. Clause not considered necessary. In first line after "warrant" insert "as in the last preceding section mentioned."

14. Any party in whose possession movable property shall be ordered to be attached in terms of sections twelve and thirteen hereof who may hinder and prevent the Messenger executing his warrant for such attachment as herein described shall, upon conviction thereof, be liable to punishment in terms of section fifty-four of the Principal Act.

Clause Fourteen.—Should be extended to include a judgment debtor who may hinder or prevent a Messenger from executing a warrant on property in his own possession. The words in last two lines, "in terms of section fifty-four of the Principal Act," might be deleted and the following substituted "to a fine not exceeding £5 or seven days' imprisonment with or without hard labour." That

for this Clause should be substituted section forty-seven Schedule B of the Transvaal Proclamation 21 of 1892. That the following words be deleted, "in terms of sections twelve and thirteen hereof," and after the word "described" be added "as well as in the Principal Act." It is suggested the provisions of this Clause be made to apply to any writ of execution. The word "person" should be substituted for the word "party" in this and the previous Clause.

15. Notwithstanding any provision to the contrary in section twenty of the Principal Act, it shall be lawful for a Court of Resident Magistrate upon cause being shown to grant a warrant for the further civil imprisonment of a defendant to complete the period of such imprisonment as provided in the decree granted by such Court in terms of section seventeen of the said Act when such period shall not have been completely served by the defendant and even if he shall have previously for any reason whatever have been discharged from such imprisonment.

Clause Fifteen.—Considered somewhat drastic. Paarl, Colesberg, Calvinia, Beaconsfield, Kenhardt, Taung, Cradock, Port Alfred, Mafeking, Bedford, Steytlerville, Robertson, Victoria East, Barkly West, Port Elizabeth, Peddie, do not favour this Clause. There should be some finality about the judgment creditor's action. Proposed that words "and even if he shall previously . . ." to end be deleted and following words inserted: "by reason of his having been discharged from such imprisonment through bodily illness." Present law goes far enough in the matter of arrest for civil imprisonment. Middledrift agrees with emendation in this section. The powers of Magistrates in the matter of civil imprisonment are not clear under the present law and Barkly East thinks this Clause does not improve matters.

16. Section sixteen of the Principal Act shall be amended by the addition of the words "and why he shall not be ordered to pay the costs in and about obtaining and executing such decree" immediately after the words "against him" in the fourteenth line of the said section. Section twenty-two of the said Act is hereby repealed.

Clause Sixteen.—Wynberg, Calvinia, Beaconsfield, Murraysburg, Alexandria, Mafeking, Bedford, Steytlerville, East London, Victoria East, Barkly East, not in favour of this section. Debtors should not in all cases be made to pay costs of decree, of arrest and of subsequent maintenance. Section twenty-two of Principal Act should be retained as a more suitable provision. Aberdeen, Peddie, are of opinion that in all cases of civil imprisonment the question of costs should be left entirely in the Magistrate's discretion.

17. Section twenty of the Principal Act shall be amended by the addition at the end thereof of the following words "together with cost of arrest and maintenance while under arrest."

Clause Seventeen.—Wynberg, Colesberg. Calvinia, Beaconsfield, Murraysburg, Alexandria, Grahamstown, Mafeking, Bedford, Steytlerville, East London, Victoria East, Kuruman, not in favour of this section. George considers the words "and maintenance" questionable. Philipstown suggests the omission of the words "and maintenance while under arrest." Aberdeen is in favour of this Clause subject to the provisions of Clause Sixteen. Peddie suggests some such words as "together with costs in respect of arrest and maintenance while under arrest as were awarded against him when decree granted."

18. Notwithstanding anything to the contrary in sections twenty-three and twenty-four of the Principal Act or any other law a Court of Resident Magistrate shall have the same judicial discretion in awarding costs to a plaintiff in an action as described in the said section twenty-three of the Principal Act as it has in all other suits.

Clause Eighteen.—Wynberg, Beaconsfield, Bedford, Steytlerville, not in favour of this section. Aberdeen has found no valid objection to this Clause. Middledrift considers it a fair provision.

19. The twenty-sixth section of the Principal Act shall be amended by the insertion in the twenty-third line thereof, after words "action aforesaid," of the following :—"and of distress or seizure and of costs incidental to such distress or seizure." The affidavit and security bonds provided in the said section may be sworn and executed before any Justice of the Peace, and in the event of such security bond being so executed, the Justice of the Peace before whom the person acting as surety shall sign and execute the bond, shall authenticate the same by writing on the instrument of the bond that such person is known to him as the person represented by his sigrature.

Clause Nineteen. Affidavits and security bond should be sworn to and executed before the Resident Magistrate where he issues the rent order and should then and there become part and parcel of his records ; matter should be kept out of hands of Justices of the Peace, who are often interested parties. Clanwilliam thinks Clause unworkable. The Justice of the Peace should not be an advocate, attorney or agent in practice. Suggested that the words "and costs incidental to such distress or seizure" be not inserted, as they will occasion many disputes as to charges not legally taxable under ordinary circumstances. Simonstown is strongly in favour of this Clause. Philipstown suggests the omission of words "The affidavit and security bonds provided," to end of Clause.

20. The twenty-seventh section of the Principal Act shall be amended by the insertion in the seventh line thereof, after the words "such order," of the words "and costs."

Clause Twenty. Costs should be provided for in tariff. Grahamstown not in favour of this Clause.

21. The proviso to section thirty-two of the Principal Act shall be repealed.

Clause Twenty-one.—Clanwilliam, Philipstown, Sutherland, Murraysburg, Alexandria, Cradock, Mafeking, Bedford, Robertson, Mossel Bay, Oudtshoorn, Somerset West, Victoria East, Kuruman, Barkly West, Barkly East, Aliwal North, do not agree with this amendment. Unduly harsh and unnecessary. That this Clause be deleted, and that proviso to section thirty-two of Principal Act should stand. Clause to be deleted and following substituted: "The proviso in the thirty-second section of the Principal Act is hereby repealed and the following is enacted in lieu thereof, provided always that it shall be competent for the tenant at any time before such sale to pay the amount of rent due and in arrear, together with such further sum as the Magistrate shall tax and allow for such costs and charges as have been incurred in and about the order and for the cost and charges to be incurred by the Messenger in connection with such seizure and arrest, as aforesaid, and thereupon the movable property arrested shall be restored."—Queenstown.

22. From and after the date of the promulgation hereof, no person shall be admitted and enrolled as agent of any Magistrate's Court. The rights of all persons admitted and enrolled as such agents at the time of and prior to such promulgation shall not be modified or in any way affected hereby, but shall continue exactly as if this section had not been enacted.

Clause Twenty-two.—Beaufort West, Aberdeen, Petrusville, Mafeking, Klipdam, consider this Clause necessary. To read in lines 37 and 38, "no person shall be admitted and enrolled as an agent." Gordonia is not in favour of this Clause; section eight of Act 43 of 1885 is sufficient. There are places where no attorneys care to practise, and at such places agents are very necessary.

23. It shall be an offence for any person to act falsely as a duly qualified practitioner of a Magistrate's Court. Such offence shall be cognisable by the Court of the Resident Magistrate of the district wherein the offence is alleged to have been committed. Upon first conviction for such offence the offender shall be liable to a fine not exceeding £5 and, or imprisonment not exceeding seven days, with or without hard labour at the discretion of the Court. Upon second or subsequent conviction the penalty shall be a fine not exceeding £50 and, or imprisonment not exceeding three months, with or without hard labour at the discretion of the Court. "A duly qualified practitioner" shall be an advocate or attorney of any Court superior to the Courts of Resident Magistrate, or an agent of the Court or Courts of Resident Magistrate wherein such practitioner is admitted and enrolled or has a right to be admitted and enrolled.

"Falsely acting as a duly qualified practitioner" shall mean falsely pretending to be an advocate, attorney, agent as aforesaid,

taking or using any name, title, addition or description whereby it may be inferred or implied that the person so taking and using is a duly qualified advocate, attorney or agent, as described in this section, or that he is recognised by law as so qualified, doing or offering to do for payment in cash or for any other reward or consideration any act usually done and falling within the scope of the practice of a duly qualified practitioner.

Clause Twenty-three.—Concluding portion of definition of "falsely acting as a duly qualified practitioner" is vague and should be made more definite.—Colesberg and Murraysburg think Clause not required.—In paragraph 2, the words from "doing" in the fifth line to the end of the Clause are considered too far-reaching and may affect such institutions as Boards of Executors. Too drastic to estate agents and qualified accountants.

24. A duly qualified practitioner shall not be directly or indirectly in partnership in connection with his legal practice or the business thereof with any person not being a duly qualified practitioner, and shall not give, grant or sell any interest whatever in his practice or the business thereof to any person not being a duly qualified practitioner, nor shall such last-named person receive such interest. Being in partnership or giving, granting or selling, any interest in his practice or the business thereof, shall be held to include the promising to give or to pay or the giving and paying by a duly qualified practitioner to a person not being such of a commission upon or share of any fees or payment received or to be received by such duly qualified practitioner. Every offence against the provisions of this section by a duly qualified practitioner shall be cognizable by the Supreme Court or by any Circuit Court, the Eastern Districts Court or the High Court of Griqualand, each in its respective jurisdiction, which Courts may, upon conviction, suspend the offender temporarily or absolutely from the practice of his profession, or may make such order as it may think fit. Any offence against the provisions of this section by persons not being duly qualified practitioners, shall be cognizable by Courts of Resident Magistrate, and the penalties shall be the same as those provided in section twenty-three hereof,

Clause Twenty-four.—Suggested that words "in the course of such legal practice and business" be inserted after "duly qualified practitioner" in line 9. Attorneys should in first instance be amenable to the jurisdiction of Resident Magistrate's Court. Section not fair to a long-established agent who has worked up a good business. No provision is made for safeguarding existing partnerships between duly and qualified practitioners and non-professional men. At end of Clause the following to be added "Nothing in this section shall be construed as to permit any attorney being in partnership with any advocate of any of the Superior Courts of this Colony." This Clause might

seriously affect "sleeping partners" *i.e.* where a practitioner is deceased but prior to his demise he took in a partner and stipulated that upon his death his surviving spouse should draw a certain sum per annum out of the profits of the firm. Similar provisions might be adopted for the purpose of putting a stop to the practice of "touting" by a person in receipt of regular salary or wages.

25. Section thirty-seven of the Principal Act is hereby repealed and the following is enacted in lieu thereof :—

> The Supreme Court may inquire into any charge of misconduct preferred against any agent of a Magistrate's Court, and should the same prove to be well founded, may order the removal of his name from the roll of agents either conditionally or absolutely, may suspend him from practice for a limited period or may make such other order as it may think fit. All such proceedings shall, as far as possible, be brought to hearing and adjudication in the same manner as complaints against attorneys and the proceedings thereof conducted.

Clause Twenty-five.—The Resident Magistrate's Court is the proper place to deal with cases of misconduct of its agents. Tulbagh not in favour of this Clause, so also Beaufort West, Aberdeen, Taung, Murraysburg, Jansenville, Grahamstown, Mossel Bay, Somerset West, East London, Gordonia, Barkly East. If any change desirable it is that attorneys should come within the Magistrate's jurisdiction for misconduct. Such a course would be more expeditious and less costly. Last sentence to be deleted and the following substituted :—"The Resident Magistrate of the Court in which any agent shall be enrolled shall hold an enquiry into any charge of misconduct brought to his notice or preferred against any such agent and shall secure the attendance of all witnesses in support of such charge, or of any other witnesses whom the agent may desire to call on his behalf and shall take the evidence of such witnesses on oath and record the same. Upon the completion of the record of the evidence so adduced at such inquiry, the Resident Magistrate shall forward such record to the Attorney-General who shall, if he be satisfied that a *prima facie* case of misconduct appear from the record, forward the record to the Registrar of the Supreme Court with the request that the case may be set down for hearing. The Registrar shall then set the case down for hearing and shall notify the Attorney-General and such agent of the day appointed for the hearing. Upon the day appointed for the hearing, the Court may after the record has been read, and after considering such further evidence as may have been tendered, and after Counsel for the Attorney-General and such Agent, respectively, have been heard make such order as he may think fit."—Queenstown.

26. Sections thirty-eight and thirty-nine of the principal Act and section seven of Act No. 21 of 1876 are hereby repealed: the following is enacted in lieu thereof: –

> The Judges of the Supreme Court shall by rule or order fix and shall at their discretion alter, amend or make additions to the fees and charges to be allowed to duly qualified practitioners in connection with the prosecution or defence of or in connection with any other work being part of or incidental to any civil action in any Court of Resident Magistrate. Such rules or orders shall be promulgated in like manner to the promulgation of rules and orders of the Supreme Court.

Clause Twenty-six.—Beaufort West, Grahamstown, Barkly West, not in favour of this Clause. Considered superfluous. Mafeking fully agrees with the proposed alteration. The provisions of sections thirty-eight and thirty-nine of Principal Act are inadequate now and should have been amended long ago. To be deleted and the following substituted: "Sections thirty-eight and thirty-nine of the Principal Act are hereby repealed and the following section enacted in lieu thereof:—

> "The party, whether plaintiff or defendant, in whose favour any judgment of any Court of Resident Magistrate in any civil action or proceeding shall be pronounced, shall be allowed in the taxation of costs against the opposite party such fees and disbursements of the agent or attorney of the successful party as may have been reasonably incurred in and about the prosecution or defending of the action or proceeding, and on the scale provided by the tariff of charges which may now or in future be framed; in the absence of such provision in respect of any fee or disbursement the Clerk of the said Court shall allow such sum as shall appear to him reasonable and not prohibited by any rule of Court. Provided that nothing herein contained shall be construed so as to deprive any such Court of any discretionary power which it may now by law possess to refuse costs to any suitor to whom it would in the judgment of such Court be inequitable to allow the same."—Queenstown.

27. Notwithstanding any provision to the contrary in section forty of the Principal Act, the fee to be allowed to an advocate in any taxation of costs between party and party shall not be more than three pounds three shillings.

Clause Twenty-seven. Advocates appearing in Resident Magistrates' Courts should be subject to fees provided for the attendance of attorneys. The following see no necessity for this Clause:—Philipstown, Cradock, Mafeking, Mossel Bay, Barkly West.

28. The only persons who shall be allowed to practise in Courts of Resident Magistrates shall be advocates and attorneys of the Supreme Court, attorneys of the Circuit Courts, and agents admitted and enrolled as such at the time and prior to the promulgation of this Act.

Clause Twenty-eight. Seems redundant. If it remains it should be made clear that agents can only practise in those Courts in which they have been admitted. The following addition to the Clause is suggested :—"Also articled clerks who have served twelve months and who appear on behalf of their principals."

29. Notwithstanding anything to the contrary contained in any law, a convicted person or anybody on his behalf shall be enabled during seven days next after the day of conviction to give notice to the Clerk of the Magistrate's Court by which he was convicted of his intention to appeal, and should such appeal not be prosecuted within the period fixed by section five of Act No. 35 of 1893, the Court to which such appeal is intended to be made shall have the right, at its discretion, to grant such additional or extended period as it may elect during which such appeal shall be prosecuted.

Clause Twenty-nine. Paarl considers this Clause unnecessary, as section four, Act No. 21 of 1876, affords accused sufficient time to note appeal. There is the objection that records will have to lie in Resident Magistrate's office for a longer time before going to review. De Aar sees no reason why time should be extended to seven days, as four days are quite sufficient. In the last line that "may" be substituted for "shall." Simonstown strongly opposes this Clause. The words "section five of Act No. 35 of 1893" appear to be incorrect; probably it was intended to refer to "section four of Act No. 21 of 1876." After the word "anybody" in second line insert "authorized."

30. Whenever at the termination of a preparatory examination taken against any accused person the Court of Resident Magistrate shall decide to transmit the record of such examination to the Attorney-General for his consideration, the presiding Magistrate at the close of such examination shall, in addition to any other questions or statements he shall be required to ask of or make to the accused, ask him whether, in the event of the Attorney-General deciding that the charge against him or any other charge the Attorney-General may make upon the depositions contained in such record must proceed to trial, he desires that he shall be tried by the Court of the Resident Magistrate or by a Judge and Jury, and the answer of such accused person shall be recorded in writing as part of the said record, and the Attorney-General, if deciding to proceed further against the accused, shall give effect to the expression of his desire so recorded.

Clause Thirty. The following stations do not approve of this section:—Wynberg, De Aar, Riversdale, Piquetberg, Colesberg, Victoria West, Tulbagh, Vryburg, Malmesbury, Worcester, Ceres, Steynsburg, Naauwpoort, Uniondale, Porterville, Calvinia, Montagu, Ladismith, Sterkstroom, Beaufort West, Cathcart, Adelaide, Komgha, Wellington, Bredasdorp, Simonstown, Beaconsfield, George, Philipstown, Sutherland, Kenhardt, Aberdeen, Petrusville, Taung, Murraysburg, Wodehouse, Alexandria, Tarka, Jansenville, Cradock, Britstown, Grahamstown, Kimberley, Venterstad, Port Alfred, Mafeking, Bedford, Graaff-Reinet, Steytlerville, Willowmore, Robertson, Mossel Bay, Stockenstrom, Oudtshoorn, Fort Beaufort, King William's Town, Middledrift, Somerset West, East London, Klipdam, Kuruman, Keiskama Hoek, Gordonia, Richmond, Barkly West, Calitzdorp, Burghersdorp, Barkly East, Somerset East, Peddie.

If the Clause is passed in its present form Magistrates may have to dispose of cases in which the penalty is death. There will be an overcrowding of the gaols by persons awaiting trial by jury and consequent increased expenditure. There would not be objection to the Clause if the Attorney-General is left the discretion whether to give effect to the request of accused or not. The wording of the second line of this Clause is incorrect as it does not rest with a Magistrate "to decide to transmit the record of such Preparatory Examination to the Attorney-General for his consideration"; all preparatory examinations are submitted and not the records but only copies thereof.

31. It shall be lawful for any Court of Resident Magistrate, upon the application of either party to a suit or whenever such Court shall deem it necessary, to examine one or more parties to a suit or any witness or witnesses, domiciled, resident or being within the jurisdiction of such Court and who are unable to attend Court in person, by interrogatories to be framed or approved by the Court and which may be administered and sworn before the Resident Magistrate or before any Justice of the Peace at such place whereat such party or witness shall be, and which shall be delivered to the Clerk of such Court immediately after being completed by the Magistrate or Justice of the Peace who shall have administered same and before whom same were sworn.

Clause Thirty-one.—Would prove great boon to litigants. Paarl, Beaufort West, Tarka, Mafeking, Bedford, Stockenstrom, East London, Victoria East, Albert, Barkly East, Somerset East see no necessity for this Clause. De Aar, Jansenville, Britstown, Kimberley, Steytlerville, Fort Beaufort think it will be open to grave abuse in country districts. It is better to see and hear witnesses giving evidence. Grounds of inability to attend should be defined. Suggested that the words "Justice of the Peace" mentioned twice be deleted.

32. If either of the parties to a suit in any Court of Resident Magistrate desires the evidence of a party or witness who is unable to attend Court in person and who is domiciled, resident or otherwise within the jurisdiction of such Court, and such party is of opinion that such evidence can be more adequately taken and obtained by means of ordinary examination and cross-examination, then shall the Court of Resident Magistrate upon the application of either or both parties and upon being satisfied that there are no reasons such as that such party or witness is suffering from an infectious or contagious illness to prevent or render such course impolitic, hold a special sitting for the purpose of the taking of such evidence at the place where the party or witness to be examined is, and his evidence shall then be taken by examination and cross-examination by the parties or their representatives and shall be recorded exactly as if the proceedings were being held in the premises wherein such Court usually sits.

Clause Thirty-two.—Would prove great boon to litigants. It should be left for the Court to decide whether the interests of justice could best be served by procedure contemplated by this Clause. Applicant should be made to pay costs of the Special Sittings. Considered an undesirable provision ; it is not consistent with the dignity of the office to require a Magistrate to hold a Court in a sick room. Should apply only in the case of old and infirm witnesses and then only rarely. The following stations not in favour of Clause :—Beaufort West, Beaconsfield, Taung, Tarka, Jansenville, Grahamstown, Kimberley, Hanover, Bedford, Stockenstrom, East London, Victoria East, Barkly East.

33. Section fifty-two of the Principal Act is hereby amended by adding the following between the words "pending" and "and such evidence" in the forty-fifth line thereof :—

> "Or in lieu of obtaining the evidence of such party or witness by interrogatories, as aforesaid, upon the application of any one or more parties to the said action, the Court shall grant under the hand of its presiding Magistrate a Commission in writing to the Resident Magistrate of the district wherein such party or witness shall reside. Such Commission shall depute to the Resident Magistrate, to whom same is addressed, the taking on oath and recording in writing of the evidence of the said party or witness, and the instrument thereof shall be in the form *mutatis mutandis* of Rule 15 of the Schedule to this Act. The Resident Magistrate, to whom same shall be addressed, or in his absence or otherwise by reason of his inability to act thereunder, an Acting or Assistant Magistrate of the district wherein such witness shall reside, shall, as soon as shall be convenient after the receipt of the said Commission, appoint a day and hour for the attendance at his Court of the said

party or witness and shall summon him to attend, or such Magistrate may attend at the place where such party or witness resides or is staying, if he is unable to attend at his Court, and if there be no reasons for which it would be impolitic for such Magistrate to attend at such place, and at the time appointed by such Magistrate the parties to the said action or their Counsel, Attorneys, or Agents shall be entitled to be present and respectively to examine, cross-examine and re-examine the said party or witness exactly as is done in the conduct of civil suits in Magistrates' Courts. After the evidence of such witnesses shall have been completely taken and recorded in writing, the party or witness shall sign the same at the foot thereof, the Magistrate or other person who has acted under the Commission shall attest such signature and shall without delay forward to the Court which granted the same the instrument of such Commission together with the original record of the said party's or witness' evidence and any documents or other matter or thing produced in evidence by such witness."

Clause Thirty-three. Would prove great boon to litigants. Paarl, Colesberg, Beaufort West, Taung, Bedford, Stockenstrom, Middledrift, East London, Victoria East, Barkly East, not in favour of this Clause. A more expensive course than obtaining evidence by interrogatories but a more satisfactory one. In criminal cases the Magistrate of the District where the offence is committed should be empowered to summon the accused from another district to answer the charge before himself. At present he can only do so by warrant. Aberdeen thinks that evidence taken on commission as proposed will prove far more satisfactory than the present system of interrogatories and will assist the cause of justice. Murraysburg too considers that interrogatories should be done away with altogether.

34. This Act shall be called "The Courts of Resident Magistrate Amending Act, 1909," and shall be read as one with the Principal Act.

Clause Thirty-four.—The following to be substituted :—"And whereas it is expedient to add to and in some particulars amend the rules, orders and regulations respecting the manner and form of proceeding in civil and criminal cases before the Courts of the Resident Magistrates : Be it enacted that every rule, order and regulation in the Schedule to this Act contained shall be deemed and taken to be of the same force and effect as if the same had been embodied in so many enacting clauses of this Act."

Section thirty-four to read as section thirty-five.—Queenstown.

General.

General.—That a tariff of charges or costs be provided for in the Bill. That the law be amended to enable a Magistrate to continue the hearing of a case commenced in a Periodical Court at the main Court of Resident Magistrate for the district. That present Act remain in force till Union Parliament can bring in a uniform Act. Bill is considered an engineered scheme and the result of a combined effort on the part of attorneys to add to their incomes. That a rule be inserted to legalise the endorsement of criminal summonses by Magistrates outside the jurisdiction of the Magistrate in whose district the crime or offence is committed. The Magistrate or clerk should be given the discretion as to when a summons should be issued in the Main Court or Periodical Court; at present plaintiff may summon defendant to Main Court though latter may reside nearer to Periodical Court. Provision should be made for giving the Public Prosecutor power to compel persons, by means of summons, to appear at their office and testify all they know concerning any crime or offence which is believed to have been committed to enable proceedings to be taken if thought fit; this is very necessary as at present the prosecution frequently cannot find out what a witness will state till after he has been subpœnaed and gives evidence. Such summons to be issued only on the Magistrate being satisfied as to its necessity. The punishment for contempt of Court should be materially increased and Magistrate allowed discretion of imposing imprisonment with or without hard labour and without the option of a fine. This should also apply to accused persons undergoing trial. It has been found that a plaintiff at the last moment, when he discovers he has no case, withdraws it, thus evading a Ruling of the Court as to the payment of costs. Provision should be made for this. That provision be made compelling Magistrates to wear a gown while on the Bench. That provision be made for the summoning of an accused who has committed an offence within the jurisdiction and subsequently left the district. Prisoners often answer "I have nothing to say" when they mean they are guilty; Magistrates should be permitted to ask them what they mean. With reference to section two of Act 21 of 1869 (Juvenile Offenders) several Magistrates think the age should be raised from 14 to 16; Sutherland likes to see it raised to 18 years. A Magistrate should have the right to convert a preparatory examination into a summary trial. Attention is drawn to the fact that as the law now stands, in Districts where there are a Magistrate's Court and Detached Assistant Magistrate's Court it is competent for a plaintiff to bring his action in either Court though the one he chooses may be farther away than the other. A case has actually occurred at Petrusville; the plaintiff, defendant and all witnesses resided in that village (which is an Assist-

ant Resident Magistrate's Court station) yet the action was brought in the Main Court (Philipstown) which is 26 miles away. In Rule 73 of Principal Act provision should be made for imprisonment in default of payment of fine. It would be very pleasing to the public to have a law whereby a Crown Prosecutor is appointed in our Courts so as to do away altogether with the extraordinary position of the Magistrate acting as such. Provision should be made that debtor should be required to pay the fee of 3s. 1d. due to Attorney or Agent for demand and postage provided creditor has given him notice that he will hand the account over for collection. It is suggested that the present law with regard to superannuation of judgment in Magistrate's Court be amended which in the case Meyer *v.* Pohl has been fixed at one year (case decided in 1830 and has now by custom become law). Under Section 31 of the Principal Act provision should be made for accused to have the option of paying a fine. The Court should be empowered in any special case in the interests of good order and public morals to direct that the trial take place with closed doors; this is occasionally done but there seems to be no legal warrant for it in this Colony. Several Magistrates suggest the jurisdistion conferred by section forty-two of the Principal Act ought to be raised. Accused persons in cases in which the Attorney-General has decided to indict are often kept in gaol for 5 or 6 months awaiting trial. As Circuit Courts are not held at frequent intervals it is suggested that in such cases a Court of three Magistrates might be constituted. The word "offence" in section forty-four of Principal Act should be defined, as it does not seem to apply to statutory offences (*vide* R. *vs.* Barclay and others.) Provision should be made for the infliction of lashes in first offences in the case of male persons charged with crimes of violence upon females and children. Provision should be made whereby the suspension or removal from the Roll of an agent in one Resident Magistrate's Court should have effect in all other Courts in which such agent is enrolled. It is a practice not to cross-examine witnesses at a preparatory examination although the circumstances are such that it is almost certain that the case will be remitted to the Magistrate; the consequence is that witnesses have to be recalled from considerable distances entailing great hardship on such of them as are not entitled to witness expenses. The present would appear a suitable time to remedy this.

Schedule.

Conduct of Civil Cases.

1. On the return day of any civil summons or plaint and when same shall be called for hearing by a Court of Resident Magistrate, if the plaintiff shall be present or represented and the

defendant shall appear either personally or by representation, the Court shall ask the defendant whether he confesses or denies plaintiff's claim or whether he excepts or makes any claim in re-convention thereto or otherwise disputes the same. Such defendant's answer shall be recorded.

2. If the defendant does not admit the plaintiff's claim, the Court shall, if so requested by either party to the suit, postpone the hearing and trial thereof to a later date and shall order the defendant to file with the Clerk of the Court by such date as the Court may fix a statement in writing signed by the defendant or his representative clearly disclosing his defence, exception, claim in re-convention or dispute, and to serve a copy of such statement upon plaintiff or his representative by the said date.

3. If the defendant shall not file and serve a copy of the said statement by the said date, the Clerk of the Court shall upon application of plaintiff bar him from doing so, and the plaintiff shall be entitled to require the said Clerk to set the suit down for the next sitting of the Court (without notice to defendant and whether or not the suit shall when considered as disputed have been set down for a later date), and at such next sitting the Court shall upon plaintiff's application grant such judgment as it may in its discretion decide.

4. Notwithstanding the provisions of Rules 2 and 3 hereof the Court shall have discretion, upon cause being shown and after the plaintiff shall have had an opportunity of being heard, if he shall so wish, in opposition thereto, to grant a defendant an extension of time during which to file the statement described in Rule 2.

5. Whenever a Court shall have granted judgment against a defendant in circumstances as described in Rule 3 hereof, such judgment shall be provisional and the suit shall be capable of being re-opened in terms of Rule 29 of Schedule B of the Principal Act, and upon the Court ordering such re-opening, the procedure provided in Rule 2 hereof shall be followed.

6. Where any judgment shall be upon a debt payable with interest, such interest shall accrue until payment shall be made by the debtor.

Conduct of Civil Cases.

Rules seem unnecessary except from an attorney's point of view and imply increased cost to litigants. Section two will not suit country districts where the parties and their witnesses have travelled long distances to attend Court; existing practice has its drawbacks but is better. As regards pleadings the Bill provides decided improvement as they could now be construed with that strictness appropriate to the pleadings in Superior Courts where they are put into writing at leisure. In section six following addition is suggested, "notwithstanding any delay in taking out execution unless such delay was due to the default of the

creditor." Suggested that in section two the word "shall" appearing in first and third lines be altered to "may." Pleadings shall be filed with the Clerk of the Court at least 24 hours before case is heard in Court so as to give presiding Magistrate an opportunity of looking up the law on the subject. Defendant should be allowed to file his defence, exception, claim in reconvention or dispute without having first to come to Court to deny plaintiff's claim, as this would incur extra expense. The proposed amendment as to a defendant filing statement in writing disclosing his defence, etc., will be of great service to the Magistrates. Several Magistrates draw attention to the inducement which section two offers for duplicating appearances in Court. Rule 6 should be omitted; interest should accrue up to date of summons as at present. Jansenville thinks there is no necessity for the judgment mentioned in section five to be provisional. The defendant appears on the return day of the summons, and is then made aware of the date by which his statement should be filed. If he finds the time allowed inadequate, he could move the Court for extension of time on notice to the opposite party. In country districts it often happens that speculators and other persons of no fixed domicile succeed in defeating the ends of justice by removing all their possessions from such districts before a plaintiff can obtain judgment, and dispose of them elsewhere. Provision might be made that plaintiff could, upon affidavit setting forth his claim and the fact that defendant is on the point of removing his possessions, obtain a warrant from the Magistrate for the attachment of such movables pending an action to be brought.

Appeals.

7. Notwithstanding anything to the contrary in Rule 33 of Schedule B of the Principal Act either party to a suit may make known to the Clerk of the Court his intention to appeal from any judgment or sentence of the Court during seven days next after the date upon which such judgment or sentence was pronounced. The said Rule 33 is further amended by the deletion of all words commencing "immediately after" in the eleventh line thereof to the end thereof.

8. Rule 34 of Schedule B of the Principal Act is hereby amended by the omission of the words "and the proper security for costs given" in the second line thereof.

9. Rule 46 of Schedule B of the Principal Act is hereby amended by the omission of the words "so" and "under security" in the third line thereof.

Appeals.

Seven days is an improvement on present indefinite period. It is thought that a further period should be allowed after the 7 days and the party appealing should be allowed to withdraw the

appeal within that period. In appeals, Counsel's opinion is usually sought and on that opinion the matter is proceeded with or abandoned and in many country places remote from Cape Town and with few postal facilities such opinion cannot be procured within the 7 days mentioned. Provision should be made for the refund of the appeal deposit if the appeal is withdrawn within fourteen days. £1 17s. 6d. deposit in appeals should be increased to £5 (Mafeking thinks it should be increased to £10) to be refunded to appellant if successful or if appeal withdrawn in prescribed time. It is considered that Rule 33, Schedule B of the Principal Act requires no amendment. Rule 8 should be omitted; security for costs to remain as at present. Rule 9 should be omitted and Rule 46 of present Act remain in force.

Warrants of Execution.

10. The following amendments to the forms contained in the rules indicated below of Schedule B of the Principal Act shall be made:—

(*a*) Rule 48 add words "and costs" after the word "imprisonment" in the fifth line of form.

(*b*) Rule 49 add after the date in eighth line of form "together with costs of arrest and maintenance."

(*c*) Rule 50 add after "thereof" in nineteenth line of form "and why he shall not be adjudged to pay the costs of these proceedings."

(*d*) Rule 54 in fourth and tenth lines of form add "and costs" after amount of capital claimed.

(*e*) Rule 55 in eighth line of form substitute "the costs and my legal charges" for "my legal charges."

(*f*) Rule 56 in sixth line of form add "and costs" after "rent."

(*g*) Rule 57 in thirteenth line of form add "and costs" after "amount of capital."

(*h*) Rule 58 in sixth line of rule add "at the instance of claimant" between "shall" and "issue" and in seventh line delete "and the claimant."

11. The Clerk of the Court shall transmit the proceedings to the Registrar of the Court, to which appeal is being made, within seven days after the appeal shall have been noted, notwithstanding anything to the contrary contained in Rule 59 of Schedule B of the Principal Act.

Warrants of Execution.

Paragraph 11—The record should not be required to be sent to the Court of Appeal within seven days unless the party appealing shall so require as so many appeals are noted but not proceeded with. As Messengers have sometimes to go to remote places to attach property and cannot find any person to become surety or with whom they can leave the attached property, it is suggested that in such cases the judgment debtor should give an under-

taking in writing to produce the attached property when required, and, failing which, or having disposed of or made away with it, he be punished criminally. East London thinks that if course suggested in section eleven be followed, it would cause a deal of unnecessary trouble. Section eleven to be deleted, and following substituted :—"Within four days after an appeal has been noted, the Resident Magistrate shall frame and attach to the record of proceedings the statement of facts which he shall find to have been proved and his reasons for the judgment pronounced in the case; the Clerk of the Court shall transmit the record of the proceeding, together with the said statement and reasons, to the Registrar of the Court, to which appeal is being made, within seven days after such appeal has been noted, notwithstanding anything to the contrary contained in Rule 59 of Schedule B of the Principal Act. Thereupon the appellant shall be required to prosecute his appeal within three months after such appeal has been noted, unless his appeal has been noted to the Circuit Court having jurisdiction, in which event the appeal shall be prosecuted at the next ensuing Circuit Court."—Queenstown.

12. The appointment of an official referee in terms of section seven of aforegoing Act shall be as nearly as possible in the following form :

In the Court of the Resident Magistrate, District of

In the suit wherein is plaintiff and
is defendant.

It appearing to this Court that the matters described in schedule hereto and being part of the issue to be adjudicated upon in this suit are such as this Court is authorized under section seven of this Act to delegate for trial, investigation and report to an official referee, and this Court having confidence in your ability and integrity to act as such referee, now does this Court hereby appoint you as Official Referee to try and investigate the matters set forth in schedule hereto, and for such purpose to examine such documents and such persons upon oath as you may consider necessary, and thereafter without unnecessary delay to report to this Court, in writing, what facts have in your opinion been established by your investigation, and at what decision or decisions you have arrived upon such facts. Given under our hand at Cape Town, this day of 190 .

Resident Magistrate,
District of

13. The warrant of attachment under section twelve of foregoing Act shall be as nearly as possible in the following terms :

In the Court of the Resident Magistrate
for the District of

In the suit wherein is plaintiff
and is defendant.

Warrant to attach movable property in possession of party not being the above-named defendant

To the Messenger of the Court

Whereas upon reading the affidavit of the above-named plaintiff and it appears to me that of hath in his possession movable property (as list attached to the said affidavit), the property of the defendant, and whereas the defendant has failed to satisfy the judgment of this Court of whereby at the suit of the plaintiff he was adjudged to pay to the plaintiff the sum of £ with costs, now these are to require you to attend without delay at the premises of the said and then and there demand and attach the said and obtain delivery to yourself thereof unless he shall furnish to you security for such delivery under Rule 44 of the Principal Act.

Return to the Clerk of this Court on or before the day of what you have done hereunder.

Given under my hand at Cape Town this day of 19 .

Resident Magistrate,
District of the Cape.

14. The notice to the party from whose hands movable property is taken in attachment under section thirteen of foregoing Act shall be as nearly as possible in the following terms :—

To.....

Be pleased to take notice that, in execution of a warrant of the Resident Magistrate, district of , granted at the instance of , plaintiff in a suit wherein was defendant, and wherein the defendant has been condemned to pay the plaintiff the sum of £ , together with costs £ , I have this day attached the movable property as described in inventory served upon you herewith, that after the expiration of fourteen days hereafter I shall, if necessary, proceed to sell and realise for cash the same, and apply the amount of cash then placed at my disposal to the payment of the said debt and costs and my charges, amounting to £ . If you object to this attachment you should notify me in writing of such objection and the ground thereof within ten days hereafter.

Cape Town the day of 190 .

Messenger of the Resident
Magistrate's Court, district of

15. The Commissions to Magistrates in terms of section thirty-three of foregoing Act shall be as nearly as possible in the following terms :—

In the Court of the Resident Magistrate
for the district of

In the suit wherein is plaintiff
and is defendant.

Commission.

Whereas it has been made to appear to this Court that the evidence of of hereinafter referred to as the witness is required by the above-named plaintiff (or defendant) in order that all the facts in connection with this suit shall be proved of record in this suit and as it appears to this Court that it will be consistent with the ends of justice and for the convenience of the said witness that his evidence be taken on Commission, this Court hereby grants this Commission to the Resident Magistrate district of and deputes to him the taking on oath and recording in writing of the evidence of the said witness and requests him to return this Commission and to despatch the record of such evidence signed by the witness and attested by him (the said Resident Magistrate) and any documents or other matter or thing produced in evidence with all convenient despatch to this Court.

Given under the hand of the Resident Magistrate, district of this day of 190 .

16. Rule 36 of Schedule B of the Principal Act shall be amended by the omission of the words "take the direction of" to the end thereof, and the substitution for such omitted words of "allow the same."

17. Rules 14, 15, 27 and 35 of Schedule B of the Principal Act and any and all other rules of that or other Acts, in so far as they may conflict or be inconsistent with any of these rules shall be repealed.

Commission.

It would be better that practice of Superior Courts should be followed and that costs should be applied for after judgment has been pronounced rather than that they be left to the Clerk of the Court who generally has not been present at the hearing. Kimberley thinks section sixteen confers too much power on Clerks of the Court who are usually young men of limited experience.

[F.]

LETTER FROM MR. M. W. SEARLE, K.C., IN REGARD TO HIS EVIDENCE ON THE BILL.

Carlton Buildings,
November 24th, 1909.

The Chairman of the Select Committee on Resident Magistrates' Court Amendment Act.

DEAR SIR,

I think that the following Clause, to take the place of the Draft Clause Two in the Schedule, might be made to work in practice

in such manner that only in the more complicated cases in Resident Magistrates' Courts a plea should be filed, setting forth the defence clearly. I agree that in such cases it may be to the advantage of suitors, and especially occasion the saving of expense that such pleas should be filed. On the other hand, I do not think that this practice should be applied as a general rule.

2. "If the defendant does not admit the plaintiff's claim, or if, whilst admitting the claim, he makes any claim in reconvention, the Court shall, on the request of the parties to the suit, or on the request of one of the parties in case the Court considers that, owing to the nature of the case or other special circumstances, it is in the interests of justice advisable so to do, postpone the hearing and trial thereof to a later date, and shall order the defendant to file with the Clerk of the Court, within such time as the Court shall fix, not being less than two days prior to such date, a statement in writing signed by the defendant or his representative clearly declaring his defence, exception or claim in reconvention, and to serve a copy of such statement on the plaintiff or his representative on the same day as such statement is filed."

The succeeding sections could then remain as drafted (three, four and five).

I do not know if you think it necessary that I should be called to give evidence again before the Committee, but I can do so if you wish it.

Yours faithfully,

M. W. SEARLE.

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